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NOTES OF CASES

IN THE

ECCLESIASTICAL & MARITIME COURTS,

&c. &c.

NOTES OF CASES

IN THE

ECCLESIASTICAL & MARITIME COURTS.

VOLUME II.

MICHAELMAS TERM 1842 TO MICHAELMAS TERM 1843.

LONDON:

THOMAS BLENKARN (LATE CROFTS & BLENKARN),
CHANCERY LANE;

A. MILLIKEN, DUBLIN; T. CLARKE, EDINBURGH.

1844.

**Printed by J. & H. COX, BROTHERS, LATE COX & SONS,
75 & 76, Great Queen Street, Lincoln's-Inn Fields.**

P R E F A C E.



THE design and nature of these Notes were explained in the Preface to the first volume. The work has now reached a second volume, under circumstances highly gratifying and encouraging to the Editor, who has received many testimonies, public and private, to its utility.

THOMAS THORNTON.

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NOTES OF CASES.

MICHAELMAS TERM, 1842.

Archies Court of Canterbury.

NOVEMBER 2.

CLOWES AGAINST JONES FALSELY CALLING HERSELF CLOWES.—*Libel.*—This was a suit of nullity of marriage by reason of a false name assumed and false representations made on the part of the wife, brought by Letters of Request from the Commissary of the Bishop of Winchester for the parts of Surrey, and promoted by Mr. Edward Clowes against Harriet Jones, alleged to be falsely called Clowes. The Libel, which now stood for admission, pleaded that the party proceeded against was the daughter of David and Ann Jones, now deceased, and was born 7th May, 1824, in the City of London Lying-in Hospital, and baptized there, on the 12th May, by the name of "Harriot," as appeared by the hospital book of baptisms; that she always passed and was known by the name of "Harriet;" that she was, down to their deaths, acknowledged by David and Ann Jones to be their natural and lawful daughter; that on the death of her father, in 1830, she continued to reside with her mother till May, 1840, when she went to school, where she remained till October, 1840, constantly passing by the names of "Harriet Jones;" that, on quitting the school, she returned to her mother's residence, which she left in November, 1840, and shortly after went to reside in George Street, Adelphi, where, for the first time, she dropped and

Suit of nullity of marriage by reason of imposition practised by the wife on the husband, as to her name and condition, — the license being in a false name, unknown to the husband, — not sustained, on the ground that there was no error *de personâ*, and no fraud in obtaining the license.

Nov. 2. discontinued the use of her name of "Jones," and took that of "Harwood;" that on the 28th November, Mr. Clowes first became acquainted with her there under that name, and in February, 1841, she went to reside with him as his mistress, first in Seymour Place, and afterwards in Euston Grove; that in Seymour Place she passed by the name of "Harwood," but at Euston Grove, she dropped and discontinued that name, and assumed the name of "Bailey;" that whilst the parties were residing together in Seymour Place, in order to deceive Mr. Clowes, and induce him to marry her, she falsely and fraudulently represented to him that her true and only legal names were Emily Harriet Geraldine Terry, and that she was the natural and lawful daughter of Admiral Terry, and belonged to a highly respectable family of that name resident at Brighton, and was niece to Lady Somerset, and sister to Mrs. Colonel Clarke, resident at Brighton, and she frequently represented to Mr. Clowes that she had received letters from such her relatives, and shewed to him forged or fictitious letters fraudulently prepared by her for that purpose; that on the 20th March, 1841, she, for the same purpose, falsely and fraudulently informed Mr. Clowes (she well knowing the contrary to be the fact) that she was *enceinte*, and in June following, that, during his temporary absence, she had been prematurely delivered of twin children, such statement being false; that in consequence of these false and fraudulent representations, in the latter part of 1841, Mr. Clowes paid his addresses to her in the way of marriage, and she, representing herself to be without parent or guardian, received them, and on the 11th December, 1841, a fact of marriage took place between them in the Church of St. Mark, Kennington, in the names of "Edward Clowes, bachelor," and "Emily Harriet Geraldine Terry, spinster," by virtue of a pretended license in the aforesaid names, such names appearing in the entry made in the Register of the Parish; that, by reason of the premises, the pretended marriage was and is absolutely null and void to all intents and purposes whatever.

ARGUMENT. *Addams, D.*, against the admission of the Libel. There is

no instance of a Court being called upon to pronounce a sentence of nullity of marriage on such a ground as that of an imposition practised by the wife on the husband, by misrepresenting her name and condition; though there are *dicta* of Judges in these Courts, that a case may be conceived of imposition to such an extent as might support such a suit. If this, therefore, is a case *primæ impressionis*, it ought to be a very strong one to induce the Court to permit the suit to proceed at all; but a more weak case cannot be conceived. In all these cases, the maxim "*caveat emptor*" applies. This lady was living with Mr. Clowes as his mistress, and he knew she had assumed one false name. It is out of the question that the Court could pronounce a sentence of nullity on such grounds as here assigned, and it must reject the Libel.

Nov. 2.

*Clowes v. Clowes.*A case *primæ impressionis*.

Jenner, D., on the same side. The maxim of the law is, "*Vigilantibus, non dormientibus, jura subveniunt.*" The gentleman's own vanity and avarice got the better of his common sense. He was of full age; she a minor. If the Court entertains this case, it will have five hundred others of the same kind. All that the Court looks to, in the license, is the identity of the parties; a mere error *nominis* is no ground of invalidity. *Sullivan v. Sullivan*.*

A mere error *nominis* no ground.

Sir John Dodson, Q. A., in support of the Libel. I admit that there has been no previous case precisely in point; but in *Cope v. Burt*† there are *dicta* so strong that the Court may apply them to this case. There the real name of the wife was "Sarah Burt, spinster," and she was described in the license as "Elizabeth Melville, widow." The distinction between the two cases is, that in *Cope v. Burt*, the lady had assumed the name of "Melville" not for the purpose of the marriage, but long before; whereas, here, Harriet Jones never passed by the name of "Terry" till just before, and for the purpose of, her marriage with Mr. Clowes. Lord Stowell observed: "What is the fraud that is imputed in this case? There was no imposition on the Ordinary, or on the Minister, or on either of the parties, as the name had actually been used for a considerable time." Here,

Dicta in Cope v. Burt.

* 2 Hagg. 238. S. C. 2 Add. 229. † 1 Hagg. 434. S. C. 1 Phill. 224.

Nov. 2. there has been a fraud on the Ordinary, on the Minister, and on the party. "If it should appear," Lord Stowell adds, *Clowes v. Clowes*, "that a license, procured for one person was transferred to another, it might be a fraud which the Court would be bound to notice." So that there are frauds of this kind which the Court is bound to notice, and is the Court not bound to notice such a fraud as this? *Sullivan v. Sullivan* was a case of marriage by banns. In *Rex v. Burton upon Trent*,* the pauper's father's name was Joseph Price, and he was married by license, at Leicester, by the name of Joseph Grew, having changed his name because he had deserted from the army, and he was known by that name at Leicester, where he had resided sixteen weeks. His wife did not know his real name till a fortnight after the marriage, when he told her. The pauper was the issue of the marriage, and after his birth his parents were married by the true name. It was held that the marriage was not to be invalidated, because he had not assumed the name for the purpose of the marriage. Lord Ellenborough said: "If this name had been assumed for the purpose of fraud, in order to enable the party to contract marriage, and to conceal himself from the party to whom he was about to be married, that would have been a fraud on the Marriage Act, and the rights of marriage, and the Court would not have given effect to any such corrupt purpose; but where a name has been previously assumed so as to have become the name which the party has acquired by reputation, that is, within the meaning of the Marriage Act, the party's true name." [PER CURIAM.—Would there be an absolute nullity if there had been no license at all? The question is, how far a party ignorant of the fraud could set up a case of nullity on such a ground.] Here was no license at all. Although a license was granted by a person having proper authority to grant it, the license was not for these parties, but for "Edward Clowes and Emily Harriet Geraldine Terry," not Harriet Jones. [PER CURIAM.—Suppose it had been a forged license, and the other party had been ignorant of the fraud, what would be the effect of that, under

* 3 M. and S. 537.

the 22nd sec. of the Act?] It would be a felony. [PER CURIAM.—But what effect would it have upon the marriage? —Addams. In *Hawke v. Hawke*,* Lord Stowell said: “Even if this special license were false, it might, perhaps, be considered by some as likewise an arguable point, whether the same principle which, in favour of innocent parties, supports the act of a pretended clergyman, might not be invoked to uphold the authority of a supposititious instrument of license, obtruded upon a party, deceived by so cruel a fraud; for it can as little be expected that a young woman should ascertain the authenticity of the instrument, under which her marriage is to pass, as the ordination of the Minister who is to perform it.” PER CURIAM.—You lay it as a fraud in procuring the license by virtue of which the marriage took place. How was there a fraud upon the Ordinary, beyond the use of the name?] None beyond that; the Ordinary would not have granted a license for Emily Harriet Geraldine Terry, if he had known she was Harriet Jones.

Harding, D., on the same side. The real difficulty in the case has been suggested by the Court, with reference to the 22nd sec. of the Marriage Act. By the old Canon law, there were no licenses at all, and the Stat., when it speaks of a license, means a *bonâ fide* license. What is the use of a *Caveat*? To defeat the object of those who desire to violate the law. Sanchez† says: “*Dispensatio est adeo strictè interpretanda, ut si aliquid operetur, extendenda amplius non sit: et ratio est, quia exorbitat a jure communi.*” [Addams. Sanchez was speaking of Papal dispensations, not of licenses.] In *Ewing v. Wheatley*‡ it was held that a license may be vitiated by fraud in the description of persons.

SIR H. JENNER FUST.—Suppose it had happened that the imposition had been the other way; that Mr. Clowes had imposed himself upon Miss Jones as a person of large property and high connections, and had obtained a license in the name of Terry, or any other name; could he be allowed to set aside his own marriage? In the publication of banns,

* 2 Hagg. 280.

† Tom. 3, lib. 8. *De Dispensationibus.*

‡ 2 Hagg. 175.

Nov. 2.
Clowes v. Clowes.
Hawke v. Hawke.

PER CUR.

A “license”
means a *bonâ fide* license.

JUDGMENT.

Nov. 2. it has been held by this Court,* and by the superior Court,† that both parties must be cognizant of the fraud. In *Dor-mer v. Williams*,‡ the Consistory Court has applied the same rule to marriages by license. I do not feel much doubt as to the question of the admissibility of this Libel; but I was willing to hear the Counsel on both sides as to the construction of the 22nd sec. of the Marriage Act, whether it applies to marriages by license.

Affidavit to lead license, In the present case, the affidavit to lead the license was made by the party now suing to have the marriage declared null and void, and the effect of that affidavit is, that he prays for the solemnization of matrimony with Emily Harriet Geraldine Terry, spinster, a minor, aged seventeen years and upwards, and that "he believes there is no impediment, of kindred or alliance, or of any other lawful cause, nor any suit commenced in any Ecclesiastical Court, to bar or hinder the solemnization of the said matrimony, according to the tenor of the license," and that she had no parent living, or testamentary or other guardian, whose consent was required; he, therefore, prays that a license may issue in such terms, and it did so issue, and by virtue of that license the marriage was solemnized. It is clear on the face of his affidavit, and also from what is set forth in his Libel, that Mr. Clowes intended to marry the person to whom he was married, namely, Harriet Jones; there is, therefore, no error *de personâ*; the error, if proved, is in the name of the party, and there is no ground for the Court to infer that this is an invalid marriage through any want of consent, or affinity, or any other lawful cause. What is the ground upon which the Court is called upon to pronounce a sentence of nullity? That the party was not able to contract a marriage, or not willing to do so? No—that a fraud has been practised in obtaining the license. What fraud? Why, that one of the parties used a christened and surname which she was not entitled to bear. It appears that this gentleman, at the time he contracted his marriage with Miss Jones, was not deceived as to her character, as she was living with him as his mistress,

shews that the husband intended to marry the very person he did marry.

Fraud alleged is in obtaining the license.

* *Tongue v. Allen*, 1 Curt. 38.

† *Tongue v. Tongue*, 1 Moore, P. C. Rep. 90.

‡ 1 Curt. 870.

and there is no imputation upon her to lead the Court to conclude that she had been guilty of any impropriety before her connection with Mr. Clowes. She was only sixteen or seventeen at the time of the marriage, and Mr. Clowes was twenty-one; and it is represented by him that, she having previously gone by two different names, he addressed her in another name. The particular circumstances of this case may be different from those of former cases of this nature, but the principle is the same in all; namely, that, where there has been no error as to the person, and no fraud has been practised to obtain the license, by which another license would not have been obtained, the marriage is not void.

Nov. 2.

Clowes v. Clowes.

Principle applicable to these cases.

It is admitted that there is no case precisely in point; but there is the case of *Cope v. Burt*, following that of *Cockburn v. Garnault*,* and which was affirmed by the Court of Delegates, and that case is binding on this Court, supposing the circumstances of this case not to be essentially distinguished therefrom; for it is the decision of a superior Court. The distinction I have heard is this: the party in that case had borne the name she assumed for some time previous to the marriage, and had not assumed it for the purpose of the marriage. Still a fraud was practised on Mr. Cope, since he supposed he was marrying a widow instead of a spinster. In point of fact, the only fraud in this case was the substitution of the name. There might have been some difference if it had been suggested that, being a person of bad character, she assumed the name and reputation of a person of good character: but it is not so in this case. The authorities, with the exception of *Cope v. Burt* and *Cockburn v. Garnault*, have no very distinct bearing on the present question. A case has been cited at Common Law, in which it may be presumed that it was the opinion of the learned Judges that, if the name had been assumed for the express purpose of the marriage, the marriage would have been held by them invalid; that is, they would not have acknowledged its validity, so far as regarded the question of settlement, for that is the extent of the case. But I want to know what fraud

Cope v. Burt.

Distinction in this case.

Rex v. Burton upon Trent.

* In the Commissary Court of Surrey, 1792; affirmed by the Court of Arches.

Nov. 2.
Clowes v. Clowes.

No fraud in
obtaining this
license.

The error in
the name, not
in the person.

Ewing v.
Wheatley.

Distinction
between banns
and license.

has been practised in obtaining the license. A fraud may have been practised in obtaining the marriage, but there was no fraud in procuring the license. There is a mere allegation that a false name was used to deceive Mr. Clowes, a major of twenty-one, by a young person of sixteen or seventeen, who had been living with him as his mistress. I cannot hold that, under such circumstances, this is a void marriage. What is there to vitiate the license? Both parties were capable of contracting marriage, and both meant to do so. The error in this case was *error nominis* only; there was no *error de personâ*. The principle applicable to this case was decided by Lord Stowell in *Cope v. Burt*, and he considered it then as *res adjudicata*. The case of *Ewing v. Wheatley* was different: there the license was wilfully altered. In all these cases, it must be recollected that there is a distinction between banns and licenses. The publication of banns is a notice to all the world of an intention of the parties to contract a marriage with each other, and the Act directs that the true Christian and surname must be used, and where a different name is used, it is equivalent to a marriage had without publication of banns, and, under the old Act, the marriage was null and void. A license is a dispensation from the necessity of a publication of banns, upon conditions which the Ordinary, the authority granting the license, is willing to accept. On the oath made by Mr. Clowes, a license was granted in this case, and a marriage between parties capable of contracting marriage, and intending to do so, with each other, was solemnized, and a marriage so solemnized is not to be set aside on light grounds; the Court must be thoroughly satisfied that it is an invalid marriage by the Ecclesiastical law, or by Act of Parliament.

The Stat. 4 Geo. 4 c. 76 has introduced a very great alteration into the marriage law. It was an Act passed to "amend the laws respecting the solemnization of marriages," and one of its objects was to prevent marriages had for many years, followed by the birth of children, from being set aside, on the ground of fraud, at the suit of one of the parties, to the injury of the other innocent party, and of the children of the marriage, and it provided (by the 22nd sec.) that both par-

es must be cognizant of the fraud. This section of the Nov. 2.
 ct provides that a marriage had without publication of *Clowes v. Clowes*.
 unns, or license, shall be null and void; but the word Both parties
 ed is in the plural number, "if any *persons* shall knowingly must be cogni-
 id wilfully intermarry;" and this is held to extend to both zant of the
 e parties, not to one only; and I see no difference in re- fraud.
 ect to licenses.

I am of opinion that in this case there are no circum- No distinction
 ances to distinguish it from *Cope v. Burt* and *Cockburn v.* between this
arnault. Although there have been so many cases of un- case and *Cope*
 e publication of banns, no case has occurred in which the v. *Burt*.
 me question has been raised as to the invalidity of a mar-
 age by license. I am of opinion that the reasons alleged
 this Libel are not sufficient to render the marriage null
 id void; that the marriage had between these parties, by The marriage
 rtue of the license so granted, is a valid marriage: it valid.
 ould be of no use, therefore, to admit this Libel, as it Libel rejected.
 ould not affect the validity of the marriage.

Proctors: *G. Fielder*, for the husband; *Fox*, for the wife.

The wife, subsequently, without taking out a Citation
 ainst the husband, brought in a "Libel or Plea" for res-
 tution of conjugal rights, which raised an important ques-
 m of practice, decided in the ensuing Term. See *post*.

High Court of Admiralty.

NOVEMBER 4.

A PIRATICAL VESSEL, NAME UNKNOWN.—*Petition*.— Bounty on
 er Majesty's sloop-of-war *Pylades*, having on the 30th destruction and
 uly, 1840, brought to anchor in Quesan Roads, in China, capture of pi-
 ree suspicious-looking junks were observed lying close in rates. — Those
 ore. Captain Anson, the commander, ordered out the cut- killed by na-
 r, pinnace, gig, and jolly-boat, to inspect them, and on tives of China
 oming alongside the nearest, the decks appeared covered on shore not
 ith men, who immediately opened a severe fire upon the within the
 words of the
 Stat., "taken
 or killed dur-
 ing the action."
 VOL. II. C

Nov. 4. boats from matchlocks and cannon. The British got on board the junk, and after some sharp fighting, in which a man and a boy were killed, and many of the crews of the boats wounded or burnt, the pirates began to jump overboard, and the other two piratical vessels cut their cables and ultimately escaped in the dark. Meantime, a great uproar was heard on shore, which, it afterwards turned out, was occasioned by the inhabitants killing the pirates who swam on shore. Next morning, the boats returned to the *Pylades*, bringing with them the captured junk. On the following day, the inhabitants came to express their thanks to Captain Anson for having rid them of some most atrocious pirates, who had for several months infested their coasts, plundering their villages, and murdering the inhabitants; stating that there were at least 100 men (Malays) on board, and that those who had, on the preceding night, swam on shore, were all killed. The number of the pirates killed was 50; two only were taken prisoners, whom Captain Anson delivered over to Captain Bouchier, of *H.M.S. Blonde*.

MOTION.

Sir John Dodson, Q. A., moved the Court that, in conformity with the 6 Geo. 4, c. 49, it would pronounce that there were on board the junk at least 100 men, all of whom had been destroyed, except the two prisoners, since it might be inferred that the other 48 had been drowned or killed.

JUDGMENT.

DR. LUSHINGTON.—There are very sufficient grounds to justify me in pronouncing that this was a piratical vessel; first, because it is so called by Admiral Elliot, and secondly, the conduct of the junk, in robbing and murdering the people (Chinese) on shore. Therefore, I hold it to have been a piratical vessel, and I decree £20 each for the 52 pirates killed and taken; but as to the other 48, I am not satisfied that I can make the same decree within the Act of Parlia-

A piratical vessel. Destruction of pirates must be by Queen's subjects, to authorize bounty. ment. "Taken or secured, or killed during the attack," I conceive, must mean taken or secured or killed by the persons making the attack—namely, her Majesty's officers and men. I give £20 for the 52 men, and £5 for the others.

Rothery, Proctor.

Prerogative Court of Canterbury.

NOVEMBER 7.

IN THE GOODS OF ANNE TOZER, SPINSTER, DEC.—*Motion, ex-parte.*—The deceased died 3rd October, 1842, without parent, leaving a brother (only next of kin) and a niece. She left a testamentary paper in her own handwriting, to this effect: “It is my wish that Elizabeth Rebecca Tozer, widow of the late Isaac Tozer, should hold a life-interest in any or all the property that may come to my niece, Eliza Miriam Tozer, belonging to me, after my decease. Anne Tozer. Signed July 20th, 1842, in the presence of Anne Waldo and Mary Ann Virgo.” The affidavit of the attesting witnesses stated that, on the day above mentioned, A. W., being in conversation with the deceased on the subject of her property, which would on her death descend to her niece, a child seven years of age, suggested to her that E. R. T., the mother of the child, should have the interest of the property for her life, and the deceased, approving of the suggestion, wrote the paper in question, and A. W., by deceased’s desire, requested M. A. V. (who, with A. W., lived in the same house with the deceased) to witness the execution. The deponents being both present, the paper was read over by A. W. to the deceased, who then signed it in their joint presence, and they jointly attested the execution in her presence. After this, M. A. V., who had signed her name at some distance from that of A. W., illegibly and in a blotted manner, proposed that her son (a lad of fourteen years of age) should sign her name better for her, and A. W. then, in the presence of the deceased and with her knowledge, cut off the lower part of the paper which contained the signature of M. A. V., and handed the paper to M. A. V., who took it down-stairs, and her son, by her desire, wrote her names thereon, and she then returned and delivered the paper in the presence of the deceased to A. W., who deposited it, in the presence of the deceased and with her knowledge, in the deceased’s writing-desk, where it remained until after her decease.

A will, being regularly executed and attested, the name of one of the attesting witnesses, with the knowledge of deceased, afterwards cut off, and written by another person, not in the presence of deceased, — admitted to probate.

Nov. 7. *Addams, D.*, moved the Court to decree administration with the paper annexed, as containing the will of the deceased, to her brother and only next of kin, no executor or residuary legatee being named therein.

Tozer, dec.

MOTION.

DECREED. SIR H. JENNER FUST.—What the effect of this paper will be, I do not know; I suppose the niece will be entitled to a moiety of the property, and that the deceased intended that Mrs. Tozer, the mother, should have a life-interest in that moiety. The deceased executed this paper in the presence of two witnesses present at the same time, and they both subscribed the same, as attesting the execution, in conformity with the Act. But the subscription of the second witness now on the paper is not that of the person present at the time of execution, but that of her son. It was sufficiently executed and attested within the terms of the 9th sect. of the Act, and the question is, whether, having been so executed, it was revoked by the removal of the name of one of the witnesses, with the knowledge of the deceased, and the substitution of the name written by another person. I am of opinion that it is not a revocation, inasmuch as the 20th sect. provides that no will or codicil shall be revoked but “with the intention of revoking the same.” Here it is clear that the testatrix never intended to revoke what she had done. The will, therefore, having been regularly executed by the deceased, continued to be her will until revoked by some other will or codicil, or by some act mentioned in the Statute, which requires that such act shall be done with the intention of revoking it. I am of opinion that the paper, having been well executed, and not revoked, is entitled to probate or administration. The words of the Statute are strong: “with the intention of revoking the same.”

and not re-
voked,
without inten-
tion.

Entitled to
probate.

Form of pro-
bate.

Probate of the paper should go as it appears, with the affidavit engrossed, to shew how the name had been removed.

Wheeler, Proctor.

A holograph will, of 1832, unexecuted, produced just IN THE GOODS OF GEORGE SHEPHEARD, DEC.—*Motion, ex-parte.*—The deceased died 7th September, 1842, leaving him surviving his widow, and several sons and daughters,

wo of them minors. A few days prior to his death, he shewed the will in question to his eldest son (the principal legatee), and told him that he had written it some years before, but as he found that he had then hardly any thing to leave, he had not executed it, and therefore he considered he should die intestate; but that the will expressed his full wishes and intentions, with regard to the disposition of his property, and that he should, therefore, leave it in its then state, expressing his hope and confidence that the members of his family would coincide with it, and act upon it. After his death, the paper was found in a safe, in which the deceased kept his private papers, and in a letter-case, from which he took it when he shewed it to his son, folded up, but not enclosed in an envelope. It was dated 26th February, 1832; it was in the handwriting of the deceased, but was not signed, or witnessed, nor did it appoint any executor, or dispose of the residue. The widow renounced, and she and the other children consented to administration with the paper annexed being granted to G. W. S., the eldest son. The property (all of which was disposed of by the will) was about £1,000.

Nov. 7.

Shepherd, dec.

prior to his death, in 1842, by deceased, who approved of the disposition, but said he considered he should die intestate,—refused probate on motion.

Robinson, D., moved for administration, with will annexed, to G. W. S., the son. Under the old law, the will would have been good. [PER CURIAM.—When was it his will?] In 1832 [PER CURIAM.—According to the son's affidavit, he did not consider it was his will.] It is clear that he wished to dispose of his property according to this paper. [PER CURIAM.—What evidence is there that he considered the paper to be his will in 1832? It is not signed; as far as the Court can conjecture, he had intended to sign it, and did not.] There has been no revocation, and there was no intention to revoke.

MOTION.

PER CURIAM.

SIR H. JENNER FUST.—The only evidence in support of this paper is to shew that it was written by the deceased with his own hand, in 1832; that it disposes of the whole property, and that in 1842 he expressed his wish that his family would coincide with the disposition contained in it. But it appoints no executor, nor residuary legatee; it is unsigned, and had remained so from 1832, and the deceased,

DECREE.

Nov. 7. a few days before his death, said, with reference to this un-
Shepheard, dec. executed paper, that "he considered he should die intestate."
 In these circumstances, the Court is asked to pronounce for
 the paper as intended by the deceased to operate as his will.
 Motion re- I must reject the motion, leaving the parties to propound the
 jected. paper if they think proper to do so. I cannot decree probate
 of it on an *ex-parte* motion.

Nicholson, Proctor.

Part of a letter, duly signed and attested, admitted to probate as the will of deceased; the person to whom the letter was addressed held to be legatee and executor according to the tenor, though he was not named therein.

IN THE GOODS OF JANE WEDGE, SPINSTER, DEC. —
Motion, ex-parte.—The deceased, an illiterate person, who was at her death in the service of the Rector of Eastwick, Essex, on the 6th May, 1839, wrote a letter, addressed from thence, sent to and received by Mr. Henry Frost, of London, on the third side of which (after the conclusion and subscription) the following words appeared :—
 When I dey I would like you to burry me and take all I got for your treetmant to me and by som thin for your little Girl. Jane Wedge. Witnessed by A. S. and J. A.

One of the subscribed witnesses deposed that the paper was duly executed and attested, and that, after the execution, the deceased folded up the letter, and wrote the superscription it bore, in their presence. The property left by the deceased consisted of £58 in a Savings Bank. She was illegitimate, but the Queen's Proctor, on the part of the Crown, did not oppose the motion.

MOTION. *R. Phillimore, D.*, moved for administration with will annexed to Mr. Henry Frost, the universal legatee. Extrinsic evidence may be admitted to shew to whom the property was given.

DECREE. SIR H. JENNER FUST.—It is clear that the paper is entitled to probate, and that Mr. Henry Frost is executor according to the tenor. Mr. Frost, it appears from the letter, had been very kind to the deceased, and she expresses her obligation to him, and in this part of the letter, she tells him to take all she has got, after her decease, for his treatment of her, and to bury her. This is signed by the deceased, and duly attested by two witnesses. The letter is

addressed to "Mr. Henry Frost," and by the word "you" she could mean no other person to be legatee than the person she addressed. I am of opinion, therefore, that that person is executor according to the tenor, and that probate should pass to him.

Toker, Proctor.

Nov. 7.

Wedge, dec.

The person intended may be ascertained, and is executor *sec. ten.*, and entitled to administration.

Consistory Court of London.

NOVEMBER 10.

IN THE GOODS OF THOMAS NEWSOM, DEC. — *Motion, ex parte.*—The deceased died 20th January, 1842, intestate, a widower, without a child, but a bastard; notwithstanding which, his reputed brother (also a bastard), J. W. N., a common mariner, on the 16th March, obtained Letters of Administration of his effects (which he swore to be under £450), as the natural and lawful brother of the deceased and his next of kin. Mr. J. M., a creditor of the deceased to the amount of £300, now applied for a decree against the administrator to bring in the Letters of Administration, and shew cause why they should not be revoked, and administration granted to him. The estate was insolvent, and the Queen's Proctor, on behalf of the Crown, made no objection.

A creditor not entitled to contest an administration already granted, though *prima facie* fraudulently obtained.

Haggard, D., for the creditor, moved for the decree. *MOTION.*

DR. LUSHINGTON.—I cannot grant the decree in this case. I cannot hold that a creditor has a right to contest an administration already granted.* At the same time, if the Crown gives its consent, and allows its name to be used (on being indemnified), there could be no difficulty. There is no other remedy except in a Court of Equity.

Sir John Dodson, Q. A.—The application made to the Crown was, as to whether it would oppose *this* application.

* See *Menzies v. Pulbrook*, 1 Notes of Cases, 132: since rep. 2 Curt. 845.

Nov. 10. There would be no objection to proceeding on the part of the Crown, if it were indemnified.
Newsom, dec.

Haggard.—The administration has been out since March; the creditor would be entitled to an inventory.

DR. LUSHINGTON.—Yes; I apprehend he would.

Stokes, Proctor.

In a suit for restitution by the husband against the wife, met by a charge of cruelty, which had been the ground of a suit in another Court, that was abandoned, the husband not allowed to be heard on his petition against the admission of the wife's Allegation on that ground.—A wife not barred from pleading cruelty a second time.

THE EARL OF DYSART v. THE COUNTESS OF DYSART.

—*Motion.*—This was a suit for restitution of conjugal rights by the Earl of Dysart against his Countess, in reply to which Lady Dysart offered an Allegation pleading his cruelty, and seeking a separation on that ground.

The Proctor for Lord Dysart moved that he might be heard on his petition against the admission of the Allegation, not upon the merits.

Sir John Dodson, Q. A.—Such a motion is quite unprecedented.

Addams, D., in support of the motion.—So is the case. The Earl of Dysart is suing the Countess for restitution, and Lady Dysart, by way of defence, has brought in an Allegation, wherein she charges the Earl with cruelty. To all intents and purposes, therefore, this becomes a suit for separation by reason of cruelty by Lady Dysart against her lord. There was previously such a suit in the Court of Arches, when her Libel was given in and admitted, witnesses were examined, and Lord Dysart was put to great expense; he pleaded responsively, and then Lady Dysart abandoned the suit. I apprehend, when a party prays to be heard on his petition he has a right to be so heard.

Party has a right to be heard on his petition.
 PER CURIAM.—Not against the admission of an Allegation. Shew me a case.] There is no such case. Lady Dysart may pursue the same course *toties quoties*, and yet Lord Dysart is not to be allowed to state these facts to the Court.

PER CURIAM.—You must lay strong ground for so irregular a motion.] Does the Court say there are no means of introducing to this Court judicially what took place in the other

PER CURIAM.—I am not called upon to give an opinion upon that point; but where there is a suit for

by a wife, supposing it goes to a conclusion, and as a decree against the prayer of the wife, that is no why, if the husband should bring a suit for restitution of conjugal rights, she should not plead cruelty again.] me facts? [PER CURIAM.—I do not know that she ot plead even the same facts.] I had always under- that a wife is compelled to return to her husband she is able to prove his cruelty or his adultery. Lord : has been put to unnecessary expense and inconvenience, and there is nothing to prevent it from occurring again.

Nov. 10.

Lord Dysart v. Lady Dysart.

Cruelty may be pleaded a second time: even the same facts.

LUSHINGTON.—I am clearly of opinion, that I should JUDGE- all the established rules of the Court if I were to ad- is prayer, and even the ground laid for hearing the on an Act on Petition does not support a *prima facie* or granting it. But I reject the motion on the ground is the invariable practice of the Ecclesiastical Courts allow matter to be introduced into an Act on Petition position to an Allegation in the principal cause. I en- no doubt of the correctness of my opinion.

JUDGMENT.

The motion against rule, rejected.

tors :—*Stokes*, for the husband ; *Orme*, for the wife.

PEMBERTON v. PEMBERTON.—*Act on Petition.*—This was ally a suit for divorce by reason of cruelty by the wife at the husband, in which the Court pronounced for a tion (the sentence being affirmed on appeal by the s Court), and the Court allotted the wife, as perma- alimony, £110 per annum, which it afterwards reduced roof of diminution of the husband's faculties) to £95. usband having tendered payment of the alimony minus come-tax, the wife refused to submit to the deduction, y her Proctor, prayed to be heard on her petition for nition to enforce payment of the full amount of y.

In payments on account of alimony, the party paying may deduct the income-tax.

LUSHINGTON.—As far as I am able to comprehend JUDGE- t, I think Mr. Pemberton has a right to deduct the nd it is a question whether Mrs. Pemberton may not (as her income is under £150 a year) for a return of

Nov. 10. the money. There is no express provision in the Act respecting alimony allotted by the Spiritual Court, but I look to the whole spirit of the Act, and where money is paid by trustees, they may deduct the income-tax.

Pemberton v. Pemberton. The tax may be deducted. *Longden, Proctor for the wife.*

High Court of Admiralty.

NOVEMBER 12.

Salvage.—In ascertaining the value of the property forming the fund, a loan on bottomry and wages subsequent to the service are proper deductions, but not wages prior thereto.

THE "SELINA."—*Act on Petition.*—This was a cause of salvage by her Majesty's ships *Buzzard* and *Isis* against the *Selina*, which, having sailed from Liverpool in March, 1841, to the coast of Africa, lost the master, mate, and part of the crew, in the Bonny and Brass rivers, and being in exigency, was brought home in charge of an officer of one of her Majesty's ships. There was no dispute respecting the facts; the only question was, as to the deductions from the fund out of which the compensation was to be decreed. The value of the ship and cargo was £869; the deductions amounted to £800, leaving only £69. Amongst the deductions were a bottomry-bond for £339, taken up by the salvors on the voyage home, and £324 for wages due before the service commenced.

Sir John Dodson, Q. A., for the salvors; *Haggard, D.,* and *Elphinstone, D.,* for the owners.

JUDGMENT.

DR. LUSHINGTON.—I have no doubt that the bottomry-bond is a true deduction, and that the wages earned since the service are properly deducted, because without the men the vessel could not have been brought safely to this country; but I have considerable doubt as to the £324, the sum originally due for wages, for, supposing a ship to be in distress, and salvage services to be rendered, I question whether the claim for salvage would not take priority of wages earned before the occurrence took place; whether the salvage must not be paid before the wages, which are a *lien* on the ship. If the question had been solely between the

original seamen and the salvors, the wages would not have had priority over the salvage. I take it that their wages have been salvaged to them as much as the ship and cargo to the owners. My impression is, that I must take the value to be (adding the £324 to £69) about £400. I think the only decree I can make is, that Mr. Budd be reimbursed the expenses he is out of pocket. I cannot go beyond that ; I take them at £120, and give him the costs.

Nov. 12.

The Selina.

Original wages salvaged as much as ship and cargo.

Not to be deducted.

Proctors :—*Rothery*, for the salvors ; *Fox*, for the owners.

NOVEMBER 22.

THE "WILHELMINE."—*Act on Petition.*—In a cause of salvage against the *Wilhelmine*, a foreign vessel, by the master, owners, and crew of the *Robert Burns*, steam-vessel, this Court pronounced against the claim, dismissed the foreign owner, and condemned the pretended salvors in the costs.* These costs not being paid, the Proctor for such salvors was directed to set forth his clients' names, with especial reference to the owners of the *Robert Burns*.† In obedience to this assignation, the Proctor brought in a copy of the register of the vessel, whence it appeared that Mr. Joseph Robinson was the sole owner, against whom a Monition issued for payment of the costs (£106) of the suit, and of the Monition and service. The Monition being returned, duly served, the Proctor for the foreign owner prayed an attachment against Mr. Robinson for non-obedience to the Monition ; when the Proctor for the salvors declared he proceeded no further, and another Proctor appeared for Mr. Robinson, and prayed to be heard on his Petition against the issue of an attachment. The Act was brought in, and alleged that Mr. Robinson had been no party to the action, which had been entered without his sanction or knowledge ; that he had not been consulted of the suit, and had not, directly or indirectly, had any communication whatever with the Proctor for the salvors on the subject.

In a suit for salvage, commenced in the name of the owner of the salvaging vessel, but without his sanction or knowledge, such owner (the asserted salvors being condemned in costs) not liable to the owner of the vessel wrongfully proceeded against.

* See 1 vol. 376.

† *Ibid.* 380.

Nov. 22. *Bayford, D.*, for Mr. Robinson, was about to argue against the issue of an attachment against him, when he was stopped by
The Wilhelmine.

ARGUMENT.

THE COURT calling upon the other side to shew why an attachment should issue against an owner who had not given authority to enter any action on his behalf.

PER CURI.

Haggard, D., for the foreign owner.—The action was entered in the usual form, and it would be a great inconvenience in the practice of the Court if it does not give effect to its own decree. [PER CURIAM.—That is not the issue, which is, whether I can attach this person—whether I can make Mr. Robinson responsible for the costs.] The action included the owners of the vessel, and the decree was in the ordinary form, condemning the parties by whom or on whose behalf the action was entered. If the claim had been pronounced for, a part of the salvage remuneration would have gone to the owner, Mr. Robinson.

JUDGMENT.

DR. LUSHINGTON.—With regard to the present application, it is impossible that I can entertain a shadow of doubt. What are the facts? An action is brought in the name of the owners of the vessel, and after the action was determined by a decree of the Court, Mr. Addams, who appeared for the owner, was required, in the following terms, to set forth the names of the owners: "On the 29th June, Mr. Addams not having brought in an Act on Petition, which he had been assigned to do, Mr. Deacon repeated the prayer made by him on last Court-day; Mr. Addams objected to set forth the names of his parties, the owners of the steam-vessel *Robert Burns*;" I overruled the objection, assigning him to set forth the names by the 5th July. Now, what was the real intent, meaning, and purport of that assignation? Why, the very words of it are, that he should set forth the *names* of the owners, his parties. On the 5th July, the minute is in these words: "Addams, in obedience to the order of the Court, brought in a copy of the register of the steam-vessel, the *Robert Burns*, certified by the Deputy Marshal of this Court." This purports to be done "in obedience to the order of the Court;" but the order of the Court was "to set forth the names of his parties, the owners of the *Robert*

Assignation of
 the Court.

Burns." It seems to me that this was no compliance with the order of the Court at all: in name, indeed, it might be a compliance; but in true effect it was not, for it now clearly appears that the person, whose name is on the register of the steam-vessel, was not the party for whom Mr. Addams did appear. What are the undisputed facts? It is sworn by Mr. Robinson, and not contradicted, that the action was entered without his sanction, authority, or knowledge; that he never in any way, or on any occasion, himself, or by any agent or other person, requested Mr. Addams to enter the action, or take such proceeding on his behalf, or that of any one else; that he never was in communication with Mr. Addams, and that he was totally ignorant of the whole proceeding till he was served with a Monition on the 13th July to pay the taxed costs. The question, therefore, which I have to decide is, whether a person so circumstanced is liable to be attached for disobedience to the Monition of the Court for the payment of such costs.

Nov. 22.

The Wilhelmine.

Case of Mr. R.

The power of the Court can be exercised against Mr. Robinson only in consequence of some act done by himself, or some liability which attaches to him by law. As to any act done by himself, it is quite clear that he did no act at all, and that he had no conusance of the proceedings. As to the other point, the liability of the owner of a vessel for costs incurred in an action carried on without his permission, acquiescence, or knowledge—such a proposition has never been attempted to be maintained at Bar here or anywhere else. I know of no person who has authority to commence an action for the owner besides himself, except his own duly-authorized attorney.

No act done by him which rendered him liable, and no liability by law.

It has been argued that Mr. Robinson would have been entitled to all the benefit of the suit if it had been decided in favour of the *Robert Burns*. I do not know whether it would have been so or not; but if it were so, that would not in the slightest degree alter the case, because it would arise from this circumstance—namely, that the validity of the appearance on his behalf would not have been questioned, and the Court, in allotting him a portion of the salvage, would have relied on the fact, which no one put

His supposed interest in the event of the suit, does not make him liable.

Nov. 22. in issue, that the Proctor was duly authorized to appear for him.
The Wilhelmine.

I have no hesitation, therefore, in saying that this gentleman is entitled to be dismissed, and with his costs.
 Mr. R. dismissed with costs.

Proctors:—*Addams*, for the salvors; *Deacon*, for the foreign owner; *Rothery*, for Mr. Robinson.

Prerogative Court of Canterbury.

NOVEMBER 24.

An Administrator under a void grant applies to have the Letters revoked.—The Court requires security as to the interests of the parties entitled to the property.

IN THE GOODS OF HENRY CHRISTOPHER BERGMAN, DEC.—*Motion, ex-parte.*—The deceased died 2nd July, 1839, a widower, intestate, leaving personal property to the amount of between £4,000 and £5,000, and a real estate worth £1,800. On the 12th August, 1839, administration was granted to Mr. Charles Collins, as guardian, and for the benefit, of the two children of the deceased, who were minors, and believed by Mr. Collins to be legitimate. But, in November, 1840, Mr. Collins received information that they were not legitimate, the deceased having married his wife (who was the niece of Mr. Collins) 18th March, 1834, whereas the children were born in 1828 and 1830. As soon as he ascertained this fact, by searching the registers of the different parishes, in January, 1841, a full statement of the facts was laid before the Lords of the Treasury. The Crown, however, did not interfere, as it had no interest, there being next of kin in Hanover or in this country. Mr. Collins now applied to have the Letters of Administration granted to him revoked, stating in his affidavit that no action or other proceeding in any Court of Law or Equity was depending, and that he was ready to account to the administrator to be appointed, and give up to him the residue of the property.

MOTION.

Pratt, D., moved the Court to revoke the administration so granted.

DECREE.

SIR H. JENNER FUST.—I should like to know what has become of the £4,000 or £5,000. [*The Proctor.*—It is in

the hands of Mr. Collins, or under his control.] Must I not have some security as to this property, before I revoke the administration and discharge the sureties? I have no suspicion in this particular case, but in all cases where property has got into the hands of an administrator under void Letters of Administration, the Court should take care to protect the interest of the persons entitled to it. I believe this to be a *bonâ fide* case, from all the circumstances, and from the prompt communication with the Queen's Proctor; but I should have some information and security that no will is forthcoming, and that those who will ultimately be entitled to the property are protected. How this is to be obtained I do not know. Is the money in the funds? [*The Proctor*.—Some of it, about £1,400, in the name of the administrator; the other money is on mortgage.] This money is standing in the name of the administrator under a void grant. It is a very dangerous thing to revoke an administration without some security for the ultimate disposition of the property. I must have some communication with the office before I revoke the Letters of Administration. Let it be understood, that in this particular case I have no suspicion that it is not a *bonâ fide* case, and therefore it is the best in which the Court should make a regulation.

(The administration was afterwards revoked.)

Ring, Proctor.

Nov. 24.
Bergman, dec.

Dangerous to
revoke an ad-
ministration
without secu-
rity as to the
property.

IN THE GOODS OF ALEXANDER MURRAY, DEC.—*Motion, ex-parte*.—The deceased died at Van Diemen's Land, a domiciled inhabitant of that island, 2nd October, 1837, having executed a will, dated the preceding day, whereby he bequeathed his whole property to his wife for life, and after her death, to his five children, appointing Mr. M. Mac Gregor and Mr. R. Officer executors. He possessed property in the island, and was also entitled to two policies of insurance, for £500 each, in the Alliance Assurance Office, London. The will was, in November, 1837, duly proved in the Supreme Court of Van Diemen's Land by Mr. MacGregor only (the other executor having renounced probate),

Administra-
tion (with will)
of effects in
England grant-
ed to the attor-
ney of a perma-
nent assignee
of an insolvent
estate of a tes-
tator dying in
Van Diemen's
Land, appoint-
ed by the Court
of the island,
after the execu-
tor had taken
probate.

- Nov. 24. who, discovering the estate to be insolvent, availing himself of an Act passed by the Colonial Legislature in 1835, on the 11th July, 1838, the insolvency being declared by the Court, relieved himself of the responsibility and trouble of the executorship, and Andrew Crombie, of Van Diemen's Land, was duly elected, by a majority of the creditors, the permanent assignee of the estate, whereby the whole effects of the testator, real and personal, whether vesting in him at his death, or in his executor, became absolutely vested in Mr. Crombie, as such permanent assignee. In February, 1841, Mr. Crombie, by Letters of Attorney, appointed Mr. Thomas Kennedy, of London, to be his attorney for obtaining Letters of Administration, with will annexed, of the effects of the testator within the province of Canterbury.
- June 29. On the Fourth Session of Trinity Term, 1841, application was made to this Court for such administration, but the Judge directed it to stand over, till it was shewn that Mr. MacGregor had been aware of the two policies of insurance. This gentleman happened at the time to be in England, but he declined to interfere. On the First Session of Hilary Term, 1842, the motion was renewed, but was again directed to stand over, there being no evidence to satisfy the Court that Mr. MacGregor, the executor, who had proved the will, was cognizant of the proceedings and declined to act. The policies were at this time in Van Diemen's Land, and on their transmission to this country, with an affidavit from Mr. MacGregor, then at Van Diemen's Land, of all the facts (being in effect a renunciation), the motion was this day repeated for a grant of administration, with will annexed, to Mr. Kennedy, as the attorney of Mr. Crombie, the permanent assignee of the effects of the testator (pursuant to the law of Van Diemen's Land), for his use, until he shall apply for the same, with the consent of the widow.
- Jan. 15. *Addams, D.*, moved as above.
- DECREED. SIR H. JENNER.—Under the circumstances, I think I was justified in requiring this affidavit. Mr. MacGregor swears that he gave up the control over the property, and is willing to retire from the character of executor. I therefore decree administration to the attorney of the official assignee at
- Motion granted.

Van Diemen's Land. It is certainly a strange mode of proceeding, that an official assignee should be appointed to take all control from the executor. The sureties must justify. Nov. 24.
Murray, dec.

F. Clarkson, Proctor.

IN THE GOODS OF ELIZABETH CHUTE, WIDOW, DEC.— A will with *Motion, ex-parte*.—The deceased died 27th July, 1842, having executed a will, dated 10th July, 1837, with two codicils, dated 26th February, 1842, and 18th March, 1842, whereby, after disposing of a sum of money vested in her by a power under her late father's will, she appointed the Rev. Mr. L. sole executor and residuary legatee. The will and the first codicil are in the handwriting of the deceased; the second codicil was written by Mr. L., the executor. The property disposed of by these papers is of very considerable amount. The will, which is written on the first and second sides of a sheet of letter-paper, is duly executed and attested. It, however, exhibits various alterations, concerning which the attesting witnesses are wholly unable to depose whether they had or had not been made prior to execution, inasmuch as the contents of the will were not brought to their notice. On the third side of the sheet of paper (after the signatures) are certain unattested paragraphs, only one signed, which (the witnesses deposed) were not written at the time of execution, and as appears from the dates of "February 13th, 1839," and "February 14th, 1842," the date of the last paragraph, which is to this effect: "Having given C. W. £500 since this will was made, in 1839, I revoke the £2,000 left her, and now only leave [*sic*] £1,500." The bequest of £2,000 to C. W. is contained in the will of 1837, but is referred to in the first of the unattested paragraphs, under which is written, "Revised, February 13th, 1839." The first codicil is headed "Codicil to my will, 26th February, 1842." It is attested, but the will was not produced to the witnesses. This codicil is also written on three sides of a sheet of letter-paper, and on the fourth (after the signatures) are three paragraphs, without date or signature,

Nov. 24.
Chute, dec.

which were not seen by the attesting witnesses at the time of execution. In March, 1842 (between the dates of the first and second codicils), the deceased gave to Mr. L., the executor, a paper packet, sealed up, with directions to take custody of it. Shortly afterwards, at her request, and to satisfy her respecting certain bequests, he opened the packet, and found enclosed therein the will and first codicil, when he observed the alterations in the will, and the memoranda written by the deceased at the end of the will and of the codicil, and as the deceased intended C. W. to have £1,500 only, instead of £2,000, he, in order to effect that intention, wrote the second codicil, which is headed "Second Codicil to my will," and is to this effect: "Whereas, since I executed my will, wherein I had bequeathed £2,000 to C. W., I have given to her the sum of £500, I do hereby revoke my bequest of £2,000, and instead thereof bequeath to her the sum of £1,500." This codicil is regularly executed and attested; but the will and first codicil were not produced to the witnesses at the time of execution, Mr. L. having retained them in his possession.

MOTION.

Addams, D., moved for probate of the papers as they stood, with the alterations and additions. As the second codicil is regularly executed and attested, the question is, whether it is not a republication of the will with the various alterations, and although neither the will nor the first codicil was produced at the execution of the second, they are, perhaps, identified by the manner in which the second codicil was prepared. This question, however, has been raised in other cases, and is not yet determined.

DECREE.

SIR H. JENNER FUST.—This is a case in which the papers ought to be propounded. The question is, whether the execution of the second codicil is to give effect to all the alterations in the will, with the unattested memorandums, and the unsigned memorandums on the back of the first codicil; or whether it is only to affect the bequest of £2,000 to C. W. contained in the will, which is reduced to £1,500—a very grave and important question, not to be determined

Papers must be propounded. upon an *ex-parte* motion. I am of opinion that the papers ought to be propounded, and the question determined after

the decision of Lord Hertford's case.* I reject this motion.

Nov. 24.

Rothery, Proctor.

Chute, dec.

Motion re-
jected.

High Court of Admiralty.

DECEMBER 10.

THE "MARY."—*Act on Petition.*—This was a suit by the owner and master of the *Hero*, and the charterers of the *Whitby* and *Mandane*, to recover a compensation for salvage services rendered to the *Mary*, a whaler, near Lombok, in the South Pacific Ocean, in December, 1839. The vessel, bound on a whaling voyage, with a crew of twenty-six men and two boys, arrived off North Island, twenty miles from Lombok, and on the 28th December, the master and thirteen of the crew went on shore at North Island, to procure wood and water. Upon landing, they were surrounded by Malay pirates, who seized them: one seaman only succeeded in escaping and reaching the ship, swimming the distance of five miles. The first mate and rest of the crew on board (fourteen men and two boys), learning the disaster, proceeded to Ampannan harbour, in Lombok, for assistance, and on the morning of the 29th December, the vessel was observed approaching the island with a signal of distress hoisted; whereupon the masters of the three vessels went out to her assistance, and brought her safely into Ampannan. On the afternoon of that day, the third mate and four of the crew of the *Mary* arrived there from North Island, and reported that the master, being acquainted with the Malay language, had succeeded in making an arrangement with the pirates for the ransom of the party for a quantity of muskets, gunpowder, &c. By the aid of the salvors, the *Mary* was well armed, and despatched to the island with the stipulated ransom, and a vessel called the

Salvage. — Aiding in rescue of crew from slavery, and in attack of pirates who had cut them off, furnishes no claim for salvage. — Civil salvage rests upon services to a ship or cargo in actual danger or distress.

* *Countess de Zichy Ferraris v. Marquess of Hertford*, then waiting for argument. See post.

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The Mary.

Monkey, belonging to Captain King, a resident on the island, was likewise well armed and equipped to follow, with a view of attacking the pirates. On the arrival of the *Mary* at North Island, the pirates increased their demands for the ransom, but after some delay, they released all the prisoners but three. They were then attacked, and escaping in their prahu to the north-east side of Lombok, they were followed, and again attacked; but though some were killed, the rest ultimately escaped. The value of the ship and its cargo of oil was upwards of £7,000.

ARGUMENT.

Sir John Dodson, Q. A., for the salvors.—The rescue of the master and crew of the vessel, had it stood alone, could not be considered a salvage service; but taken in conjunction with the other services, it is a sort of military salvage. The vessel was in distress; she had a signal flying, and was firing guns; the mate in command was unacquainted with the harbour of Ampannan, and if the service had not been rendered, probably both vessel and crew would have been lost.

Addams, D., on the same side.—The *Mary*, when near Ampannan, had an insufficient crew, and the person in command could not read or write. There was no anchorage outside the harbour, and had the entrance been attempted, the vessel would have gone on a ledge of rock that crosses the mouth of the harbour.

Jenner, D., for the owners of the *Mary*.—It is a rule of this Court that danger to the vessel or cargo is the foundation of a claim for salvage. Unless it can be shewn that the vessel or cargo was in actual danger, this Court has refused to award salvage. In this case, there was no danger. If the lives of all on board had been saved by the exertions of the alleged salvors, that would have given them no claim to a salvage-reward.

Bayford, D., on the same side.

JUDGMENT.

DR. LUSHINGTON.—Much discussion has arisen as to the signal of distress, and as to the guns being fired. On one hand, it is contended that it was solely in consequence of the accident to the master and part of the crew, with a view to their rescue from their dangerous condition, and not at all

with reference to the safety of the ship ; in other words, the discussion has been as to the *quo animo* with which the guns were fired and the signals were made. It is a matter of no small difficulty to ascertain, after so long a period, the precise views which the parties entertained at the time. I consider that the moving cause must be taken to have been the loss of the master and the rest of the crew ; and that the object was to obtain assistance and advice, though it does not appear from whom. Those on shore at Ampannan, not knowing what had taken place at North Island, would naturally conclude that the ship was in distress, and required assistance, and of course their motions would be directed by that circumstance. Now, it appears that, on the morning of the 29th, this vessel was descried approaching Ampannan, and that the salvors determined to go out for the purpose of rendering *some* assistance, though they did not precisely know the exigency she was in. According to their own statement, they got out about three o'clock in the afternoon, and it also appears that a boat with the third mate and four men returned from North Island at half-past four. I mention this circumstance because it is an obvious deduction from these facts that the vessel must have been within a very short distance of the harbour of Ampannan, and that to conduct her into that port was attended with a very small expenditure of time. The third mate and four men made the crew in all eighteen or nineteen. They returned with the intelligence that the master had made an arrangement for effecting his own ransom and that of his companions. The ransom was to be procured and sent back with as much celerity as possible, otherwise their lives would have been in imminent peril.

Dec. 10.

*The Mary.*Object of
signals.Intention of
salvors.

What was the service rendered at this time, as contradistinguished from any other service rendered at another period, separate or combined with it? On the part of the salvors, it is said, that this was a service, even so far as related to the preservation of the ship and cargo, of very considerable importance, inasmuch as they were in great danger at the time. Now, let us look at the reasons assigned for this opinion.

Service at
Ampannan.

Dec. 10.

The Mary.

Exigencies of
the vessel.

First, it is said that the mate was utterly ignorant of his duty ; that he could neither read, write, nor keep his log. I confess I have some difficulty in going the whole length of that assertion. It is contrary to all probability that a ship of this value, equipped for this trade, should take a man as first mate entirely destitute of qualification for his duty. Again : it is said that he was entirely ignorant of the locality. That is much more consistent with likelihood. It does not appear that the vessel had touched at Ampannan previous to the transaction ; and it is possible, perhaps probable, that he would have required assistance to conduct the vessel into the harbour—that assistance which is ordinarily required when a person in charge of a vessel comes off a port with which he is not well acquainted, and resorts to the assistance of a pilot, or some other person possessed of local knowledge. With regard to the crew, it is averred that they were so few that they could not have navigated this vessel with safety. If I compare the original number of twenty-eight as against, first, fourteen, and then, when the others returned, eighteen, I should say that, if twenty-eight were indispensable for the safe navigation of the vessel, the probability would be that eighteen were not sufficient to conduct her with the same facility. But I must not forget that I am speaking of a vessel engaged in the whaling trade, which takes people on board not merely for the purposes of navigation, but for conducting the occupation for which they go out, and the number is not in proportion to the tonnage. A whaler, in fact, carries more hands than other vessels. Looking at the tonnage of the *Mary*, I should think that eighteen men were adequate to her safe conduct under ordinary circumstances ; and it is not alleged that the vessel had sustained damage, or that the weather was boisterous.

The first service.

Now, what were the services performed ? These gentlemen came on board, and, in the space of two, or three, or four hours—probably in two hours and a-half—this vessel, without any great exertion, was safely moored in the harbour of Ampannan. This may be classed as service the first, for which a compensation is claimed ; but before I give my opinion as to what the nature of that demand is, I think it

will be convenient to prosecute my inquiries to the end of the case.

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The Mary.

It appears that there was resident upon that island, a Captain King, who was owner of the vessel called the *Monkey*, and that he, in conjunction with the other gentlemen concerned in the prosecution of further measures, determined to go for the purpose of attacking the pirates. What object did they go to effect at that time, connected with the safety of the ship and cargo? Did they go to recover the master and the rest of the persons from custody by force? I cannot come to any such conclusion, and for this plain and obvious reason—the ransom, which the master desired to be sent, was sent for the purpose of peaceably obtaining the restoration of the master and his men. Ulterior objects were in view; but it never can be contended for a single moment that the primary intention was not that the master and the men should be restored by means of the ransom, and not by the force sent. It cannot be contended that the force went with the view of compelling the Malays to accept the ransom, because if they had power to do that, they had power to rescue them without ransom. It is quite clear that no such intention was entertained, because it is stated in the Act on Petition that the vessel of Captain King was prepared for action, and that he gave directions to keep her some distance astern, in order that the pirates might not see her till the crew of the *Mary* had been rescued by ransom, not by force or intimidation; and in fact the men were restored to liberty by the sacrifice of property, and not by any act done by the salvors. When as many of the men as could be procured for the ransom were recovered, then the attack commenced. It is not very clearly stated whether that attack was made with any prospect of recovering the carpenter and two other persons, or whether it was for the purpose of punishing the Malays. If I were to come to any conclusion one way or the other, looking at the probabilities of the case, I see no chance whatever that that attack could have been so successful as to have compelled by force the restoration of the men. But be this as it may, the attack was, as far as their restoration is concerned, unsuccessful.

Object in attacking the pirates.

Not to rescue the crew.

First attack unsuccessful.

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The Mary.

Ulterior expedition unconnected with ship.

After this attack had been made, the whole of this force went to an island about sixty miles off the scene of action, on the N.E. coast of Lombok, taking the *Mary* with them, for the purpose of attacking the pirates there. I think it is quite impossible to contend that any part of this ulterior expedition had the slightest to do with rescuing the cargo or crew of the *Mary*. It was a common union for the purpose of inflicting punishment on the pirates, and not with a view to the benefit of the *Mary*, her cargo, or crew. Having been unsuccessful in this attack, all parties returned to the port of Ampannan on the 1st of January.

I have heard it argued, that one of the advantages which the *Mary* derived from these proceedings was, that if there had been no other vessel to protect her, after the persons detained in custody had been released, the pirates might have attacked the ship, and she would not have been able to resist. But this argument appears to me to be supported by no sound reasoning. The *Mary* would have been very nearly in the same state of equipment as she originally was. Though she had lost three of her crew, she had twenty-two or twenty-three men on board; she was armed as she was before, and I can see no reason to believe that she was not as capable of protecting herself as in the first instance.

First, the only salvage service.

Looking at these facts, I am very clearly of opinion that every thing done subsequently to the 29th December is not of the nature of a salvage service; but I think it right to say more: that even had the attempt been perfectly successful—had it been an intention carried into effect, of rescuing these persons from a state of slavery—I am at a loss to conceive, the *Mary* herself having been brought into a port of perfect security, on what possible ground I could call that a salvage service. Supposing that, during war, a French cruiser had captured a British merchantman, and taken out the master, mate, and one of the crew, and then left her with the rest of the crew, and that another British vessel had come up and rendered her assistance, because of the deficiency of the crew, and had afterwards captured the French vessel, with the master, mate, and man; would anybody contend that the capture of the French vessel, and the re-

Rescue of the crew would not have been such.

taking of the master, mate, and man, was a salvage service which could be so compensated? Impossible. I am desirous of making these observations, that we may never lose sight of the principle, that a civil salvage is neither more nor less than a rescuing of the ship and cargo from some danger or distress.

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The Mary.

What is civil salvage.

The only point remaining is, whether the service rendered on the 29th of December, of bringing the vessel into port, was or was not of the nature of a salvage service. I am of opinion that it was, but that it was the very slightest possible. It was of the nature of a salvage service, principally because a signal of distress was hoisted, which induced the salvors to go out and render assistance, and because I think the fair result is, that they were ignorant of the locality, and required some assistance to bring the *Mary* safely into the port of Ampannan; and to a certain degree it partakes of a salvage service, because the original strength of the crew had suffered some, though not, as I think, any serious, diminution.

The service very slight.

Under these circumstances, then, the value of the ship and cargo is absolutely of no importance whatever, because it is quite impossible, in what I consider to be so trifling a case of merit (I mean which is legally entitled to remuneration) as this, to take that into account. I do not mean in the slightest degree to depreciate the efforts of those who went on the expedition to North Island. I think I should not be justified in giving one shilling more than £30, with costs, as there was no tender.

Proctors: *Heales*, for the salvors; *Gosling*, for the owner.

Prerogative Court of Canterbury.

DECEMBER 13.

MALTASS AND OTHERS v. MALTASS.—*Allegation.*—This was a business of proving an attested copy (the original being abroad) of the will of Mr. John Maltass, of Smyrna, by Mr. John Maltass, his son, and two other executors, against Mrs. A will made by a person of English parentage, but born and domiciled

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*Maltass v.
Maltass.*

in Turkey; invalid by English law, and by the law of Turkey, unless where applied to English subjects.—Allegation propounding the will, rejected.

Maltass, his widow and relict. The paper was propounded in an Allegation, which pleaded that the deceased's father was born in England, and about eighty years since proceeded to Smyrna, where he became a clerk, and afterwards partner, in a mercantile house, and continued to reside at Smyrna till his death; that he married there and had issue, the deceased being his eldest son, whom, when six years of age, he sent to England for education; that at fourteen, the deceased returned to Smyrna, where he became a merchant, and resided till his death in 1842, at which time he was possessed of £40,000 in English funds' securities; that he wrote the will in question with his own hand, and subscribed it on the 22nd October, 1841, but not in the presence of any witness; that by the laws of the Ottoman Empire it is not competent to a Turkish subject to make any testamentary disposition of his property, which is divided amongst his relations according to a fixed standard; but by the Capitulations and Articles of Peace between Great Britain and Turkey, finally confirmed by the Treaty of the Dardanelles, in 1809, it is agreed (sec. 26) "that, in case any Englishman, or other person subject to that nation, or navigating under its flag, should happen to die in our Sacred Dominions, our fiscal and other officers shall not, upon pretence of its not being known to whom the property belongs, interpose any opposition or violence, by taking or seizing the effects that may be found at his death, but they shall be delivered up to such Englishman, whoever he may be, to whom the deceased may have left them by his will; and should he have died intestate, then the property shall be delivered up to the English Consul, or his representative who may be there present; and in case there be no Consul or Consular representative, they shall be sequestered by the Judge, in order to his delivering up the whole thereof, whenever any ship shall be sent by the ambassador to receive the same."

The will was in the English form, commencing, "I, John Maltass, British merchant, residing in Smyrna," &c.; it was signed by the deceased, and it exhibited the word "witnesses," without any names thereunder.

Phillimore, D., opposed the admission of the Allegation.—The question is, can this be considered a will, assuming that the deceased was a British subject domiciled at Smyrna? The Act of Victoria applies to all wills of British subjects wheresoever. [PER CURIAM.—How was the deceased a British subject? He was born in Turkey. Was his father at his death a domiciled British subject?] No. [PER CURIAM.—Then how does the Statute apply to such a person?] Then, *quæcunque viâ datâ*, whether a British or a Turkish subject, this is not a valid will.

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Maltass v.
Maltass.

ARGUMENT.

Sir John Dodson, Q. A., in support of the Allegation.—The deceased was either a British subject domiciled at Smyrna, or a British subject to all intents and purposes. If the latter, I admit we could not claim probate of this paper. But if he was domiciled in Turkey, then the Statute has no application to the question. *Stanley v. Bernes** shews that the *lex domicilii* prevails, in testacy as well as in intestacy. Then, if the Turkish law applies, the question is, whether the general law of Turkey is not modified, in respect to the deceased, by the Capitulations and Treaty of 1809. Under the peculiar circumstances of his case, the deceased must be considered a foreigner; whether a British subject or not, I will not say; for some purposes, he would be a British subject; he was neither an Englishman absolutely, nor a Turk absolutely, but he was intermediate between the two. The law of domicil must be applied to him subject to the Treaty, which prescribes no form of a will. It is clear that he has “left effects by his will.” A will written by a man with his own hand is a good will by the *Jus Gentium*, and is so recognized in every country but our own.

R. Phillimore, D., on the same side.

SIR H. JENNER FUST.—The facts of this case lie in a JUDGMENT. narrow compass. The will in question is in the handwriting of the party; it is signed by him, but not witnessed, and if it were the will of a British subject domiciled in England, it would be invalid. I confess, when I first read the Allegation, the question arose, how this could be a will at all, supposing him to be a domiciled subject of Turkey, or a

* 3 Hagg. E. R. 373.

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Mallans.*

domiciled British subject. But I am told that he was a kind of non-descript—not a subject of Turkey or of England—and that his will must be tried according to the *Jus Gentium*.

Let us first inquire what is the law of Turkey, applicable to a person so situated. His father was domiciled in Turkey; he was himself born there, and resided there (with the exception of eight years) from his birth till his death. I must look at the Turkish law, unless I have it established to my satisfaction that a person so situated is not subject to that law. All I find stated in this Allegation is, that, by the law of Turkey, a subject cannot dispose of his property

The law of Turkey applicable to this case;

not before the Court.

Deceased a Turkish subject.

Allegation rejected.

by will, but that an Englishman in Turkey may. But what is the law of Turkey applicable to a person born in the Turkish dominions, who has resided in the Turkish dominions, and dies in the Turkish dominions? I am of opinion that, whatever may be the real state of the law, the Allegation does not bring it before the Court in such a form that the Court can act upon it. I consider the deceased to have been a Turkish subject, and consequently under the law of Turkey, and therefore, *primâ facie*, incompetent to make a will at all. I must reject the Allegation.

Proctors:—*F. Dyke*, for the executors; *Toker*, for the widow.

Court of the Dean and Chapter of St. Paul's.

DECEMBER 16.

Nullity of marriage *impotentia causa*, not sustained, the medical certificate negating the plea of malformation, and there not having been *trienalis cohabitatio*.

SCOTT, FALSELY CALLED JONES, v. JONES.—*Cause*.—This was a suit of nullity of marriage *impotentia causa*, by the woman against the man. The parties, Samuel Jones and Elizabeth Rebecca Scott, were married on the 8th April, 1841, he being thirty-six, and she twenty-two years of age. They lived together at bed and board for twenty-three days and nights immediately following the marriage, but ceased to cohabit from the 1st May, 1841. On the 19th May, 1842, the woman took out a Citation, under her maiden name of Scott, against Mr. Samuel Jones, in a cause of nullity of

marriage by reason of his impotency. The Libel, which was admitted without opposition, pleaded that the man was naturally impotent, and that it would appear to competent judges that such his natural impotence was irremediable and not to be relieved by art. The answers of Mr. Jones were taken to the Libel, and nine witnesses were examined in support of it, and the persons of both the man and woman had been submitted to the inspection and examination of two eminent surgeons in the metropolis, viz. Sir Benjamin Brodie and Mr. Blagden, whose certificate formed a part of the evidence, and Mr. Blagden had been examined as a witness in the cause.

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Scott v. Jones.

Addams, D., and *R. Phillimore, D.*, were heard for the woman; and *Sir John Dodson, Q. A.*, was Counsel for the man.

DR. PHILLIMORE.—The clear result of the evidence and proofs is, that hitherto the marriage has not been consummated: this fact is admitted by Mr. Jones in his answers, and by his Counsel in their argument. Another fact, as clearly established, is the virginity of the party who instituted these proceedings. I do not remember a case in which such a fact has been more clearly proved: the certificate of both the surgeons is full to this point, as well as to the absence of all defect or peculiarity in the structure of her person, and Mr. Blagden deposes on his oath that he had not the slightest doubt of her virginity at the time of her examination. On the other hand, the medical examiners certify that they can observe no peculiarity or defect of structure in the person of Mr. Jones which should prevent him from consummating his marriage; and Mr. Blagden swears that, judging from external appearance, there is no physical cause to render him impotent. There is no proof before me, therefore, of the malformation of the husband, and the Counsel on the part of the promoter of the suit have been compelled to admit that they have failed in their proof of this fact; but they have contended that the proof of his frigidity is complete, and that the rule of the *triennalis cohabitatio* has never been incorporated into our administration of this branch of the Canon law. I am, however, clearly

No structural defect in either party.

Rule of *triennalis cohabitatio*:

Dzc. 16.
 —
Scott v. Jones.

applicable to
 this case.

The reason
 of the rule.

of opinion that, in a case of this description, in which there is no natural malformation, no physical infirmity of any sort, apparent to the medical examiners, acting under the authority of the Court, the triennial cohabitation has been invariably required. I have always understood that it was on this ground alone, namely, the absence of the triennial cohabitation, that Dr. Bettesworth dismissed the suit of *Grimbaldeston v. Anderson*, where, the marriage having taken place in 1775, the suit commenced in 1777 ; the parties had not cohabited quite three months. This judgment was affirmed on appeal to the superior Court. The reason for this caution is obvious:—to use the expression borrowed from the Canon law,—that the Church may not be deceived; or, in other words, that confusion may not be brought into families, scandal imputed to the Ecclesiastical jurisdiction, and the general indissolubility of marriage impaired and degraded by parties, declared impotent by a competent Court, intermarrying with other persons, and becoming the fathers and mothers of families: no fact being more familiar to the professors of medical science, than that the consummation of marriage is often impeded and delayed from the operation of various causes, mental as well as physical.

Hardship of
 the case:

Stress has been laid in argument on the effect which has been produced on the health of the promoter of this suit by the misery and unhappiness necessarily consequent on the non-consummation of her marriage, and I admit that the evidence of the father and mother of this young woman is natural and credible, and entitled to all tenderness and consideration at the hands of the Court, on this as well as

No argument
 for interference.

the other points in the case. But, admitting the fact, how can I redress it? I have no right or power to do so: the law, proceeding on general maxims, forbids interference on notions, whether supposed or real, of hardship in particular cases. The law has defined the limits of my judgment; I have no power to annul a marriage, in which the cohabitation has continued for little more than three weeks; in which the plea of malformation is negatived, and in which the medical authorities certify that there is no physical circumstance

to prevent the husband from the due consummation of his marriage.

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Under these circumstances, I can do nothing but dismiss the husband from all further observance of justice in this suit.

Husband dismissed.

The Proctor for the husband moved the Court to assign the wife to return to cohabitation ; but

THE COURT declined to make such order, leaving it to the husband to take the proper steps, if the wife withheld restitution of conjugal rights.

Proctors :—*Puckle*, for the husband ; *Middleton*, for the wife.

High Court of Admiralty.

DECEMBER 16.

THE "GAZELLE."—*Act on Petition.*—This was an action by the owners of the *Charles*, a brig of 107 tons, against the steam-vessel *Gazelle*, belonging to the Hull Steam-Packet Company, to recover damages for the loss of the brig and her cargo by a collision, which occurred in the river Thames, near Bugsby's Reach, early in the morning of the 8th of May. The brig, which was on her voyage to Yarmouth, heavily laden with a general cargo, was proceeding down channel, close-hauled on the starboard tack, and the *Gazelle* was coming up channel, when the collision took place, in consequence of which the brig eventually sank.

Collision. — Application of the Trinity House Rules, in supersession of a custom on the river.—The Trinity Masters are not to be guided, in matters of nautical experience, by the affidavits in the cause.

The Court was assisted by Trinity Masters.*

Haggard, D., for the *Charles*.—This vessel had dropped down the river as far as Limehouse Reach, where she anchored till break of day, when the voyage was resumed. The tide was half-ebb, and the wind S.W. by W. The brig had rounded Blackwall Point, and come into Bugsby's Reach, about three o'clock. A large number of colliers lay on the south side of the river here, and the master directed the man at the helm to keep near the collier section. The *Gazelle*, coming out of Woolwich Reach, saw the *Charles*

* Captain Weller and Captain Ellerley.

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at the distance of 500 or 600 yards. The latter, being in her proper course, saw the steamer coming up in a northern course, and the pilot called to the man at the helm, "Helm a-port!" to bring her to the weather (south) shore, to which, being on the starboard tack, it was our duty to keep close. Our helm being ported, we expected that the steamer would have gone to the larboard side of the brig; instead of which, she altered her course to the S., and must have put her helm to starboard, to come between the brig and the collier section, and thus athwart the brig's hawse. We called to her to "Port;" but she took no notice, and ran with great violence stem on into the larboard bow of the *Charles*. On the part of the steamer, it is said that she kept as near the S. shore as she could, which is the ordinary course of steamers coming up the river; that the wind was from the W.; that the brig was in mid-channel, and that, on nearing the steamer, we ported our helm within 100 yards. We deny this, and it is improbable that we should attempt to cross the steamer's bows.

Jenner, D., on the same side.—The question is, whether the rules laid down by the Trinity House are not applicable to this case, and if so, whether their non-observance by the *Gazelle* was not the cause of the accident.

Addams, D., for the *Gazelle*.—If the rule was applicable, and it was in our power to comply with it, the blame lies on us; but I submit that the rule does not apply. Every thing that could be done was done by the steamer; the engines were stopped and reversed, and she was going away, when the brig ran upon the steamer, not the steamer on the brig, which ported her helm too late.

Harding, D., on the same side.

SUMMING UP.

DR. LUSHINGTON (to the Trinity Masters).—This is a case of very considerable importance, both with regard to the value of the property at stake, and also with regard to some of the principles which have been advanced in argument; and notwithstanding that it has been so ably and elaborately discussed, it is my duty, as concisely and perspicuously as I am able, to bring under your consideration such arguments as have a bearing on the present case.

I will, in the first place, advert to what has been urged upon you, with great vehemence, by the two Counsel who have addressed you on behalf of the owners of the *Gazelle*, namely, that it is our duty to decide this case by the evidence which has been given, and not to abandon that evidence for the purpose of applying any preconceived rule of right and wrong. Now, with regard to the evidence, so far as it concerns mere facts as to what took place, undoubtedly, we must decide by that evidence, comparing the testimony given on the one side with that given on the other, lifting it by its intrinsic probability, and then coming to a determination. But if by that observation it was intended to go further, and to say that, with regard to matters of nautical practice and experience, you are to be guided by the affidavits in the case, I utterly deny the applicability of that argument. You are to decide this question with reference to our own knowledge of the science and the experience you possess, and I hope it will never be contended that your judgment is to be influenced by affidavits from other nautical persons, swearing that, in their opinion, this or that was proper to be done. Sure I am that it would lead to the greatest confusion and uncertainty, rather than to any satisfactory determination.

I now come to the circumstances of the case, and will point out on what points of importance there appears to be conflict of evidence. It is stated, on behalf of the *Charles*, that "she was rounding Blackwall Point, on the starboard tack, close-hauled, to sail through the reach, the wind being still S.W. by W.; the yards were braced up, and the mate, who was at the helm, was desired by the master to keep the brig up towards the ships, meaning the collier section." The master of the *Charles*, instead of proceeding down mid-channel, kept as close as he could to the southern shore, and when he descried the steamer coming up channel, he ported his helm, for the purpose of letting her pass on the larboard side. On the part of the *Gazelle*, it is stated that she was coming up channel, intending to hug the southern shore, leaving the channel, two-thirds of the river, as he states, open to vessels coming down channel; that the

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In matters of nautical practice, the Trinity Masters not to be influenced by affidavits.

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wind was W. instead of S.W. by W., as alleged on behalf of the *Charles*. The *Charles* put her helm to port. On the part of the *Gazelle* the statement is in these words, and they are very important: "The brig, when so seen, was 500 or 600 yards distant, about a point and a half on the steamer's starboard bow." Nothing whatever is stated to have been done on the part of the *Gazelle* at that particular time; she descries the *Charles* at this distance, and so far as I can ascertain from the affidavits, after so descrying her, she did nothing, but kept her course. The *Gazelle* goes on to state, that if the *Charles* had kept her course, as other sailing vessels had done, they would have passed without the risk of collision; but, instead of so doing, all of a sudden, and when within 100 yards of her, she ported her helm, as if to pass to the larboard of the steamer. That is a very important averment in the Act, and gave rise to a very ingenious argument on the part of Dr. Addams—namely, that the helm of the *Charles* was not ported till too late a period for the *Gazelle* to have followed her example. I was very much struck with that argument, and referred to the affidavits in the cause; but they do not support the averment. All the affidavits are nearly to this effect, and I will take the statement from Mr. Hurst, the captain of the *Gazelle*: "That when the brig had arrived within a short distance of the steamer (within 80 or 100 yards), and was broad on the steamer's starboard bow, it was apparent to him that she *had* ported her helm, which she ought not to have done;" not that she then ported her helm, but when she came within that distance, he then discovered that she *had done it*—how long antecedently he does not say. The expressions in the other affidavits are nearly to the same effect—as, "discovered," or "it appeared to them." Then it is further averred that, "upon so seeing her, Captain Hurst, in the same breath, as the only mode of avoiding the then threatened collision, ordered the steamer's engines to be stopped and the paddles reversed, both which orders were obeyed as soon as given, and whereby—to wit, by such instant stopping and reversal of her engines alone—the brig, which, notwithstanding the hailing, persisted in keeping

her altered course, was prevented from striking a-midships ;" and then the collision took place. And it is very distinctly sworn in the affidavits, on the part of the *Gazelle*, that this stopping and reversal of the engines had actually taken place before the collision ; and not only so, but one of the gentlemen, whose affidavit was referred to by the Counsel for the *Gazelle*, swears that she was retrograding at the time of the collision.

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Now the question appears to resolve itself into this : what ought to have been done by the *Gazelle* at the time when she first discovered the *Charles* 500 or 600 yards distant ? If she ought then to have ported her helm, there cannot be the slightest doubt that the collision might have been avoided—nay, if, after the period when the master discovered that the helm of the *Charles* was ported, instead of stopping and reversing the engines, he had ported the helm, I should be led to conjecture that the accident would have been avoided. If there was time for the engines to be stopped and reversed, and for the vessel to retrograde, there must have been time to alter the helm.

The question, therefore, which I submit with deference to your better judgment, turns on this point : ought or ought not Captain Hurst and the other persons in charge of the vessel to have ported the helm at the time when they first descried the *Charles* ? See how the position stands : it is not denied that, by the rule established by the Trinity Board, in ordinary cases, on a steam-vessel coming up the river and a sailing vessel going down, it would be the duty of the steam-vessel to pass larboard side to larboard side ; but it is said that the peculiar circumstances of this case ought to render it an exception to the general rule. Now I am by no means prepared to deny that there may exist so peculiar a combination of circumstances as to render the application of that rule contrary to all common justice or expediency. I am not prepared to deny its possibility ; but I am perfectly aware of this, that if that rule is to operate for the general benefit and safety of navigation, and to be a guide for masters and crews, going up the Thames, it must be a rule of almost universal application. If every man is to

The rule
should be of
almost univer-
sal application.

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Alleged rule
 of the river.

engraft upon it his own exceptions according to his views of convenience or advantage, it would soon degenerate into no rule at all. It is alleged by the *Gazelle* that it was the duty of the *Charles* to have gone down mid-channel; that she ought not to have approached the southern shore, and therefore mistook her proper course; but that the *Gazelle*, coming up heavily laden, was to have kept the southern shore. Whether or not that is an established rule, of universal practice, you must form your judgment, for you are acquainted with the practice on the river, I am not. Suppose it to be the rule, then follows this question: whether, when two vessels are in this particular part of the river (the neighbourhood of Bugsby's Hole), and one describes the other approaching in such a straight line that there is a probability of a collision, the practice and custom of a steamer keeping to the southward and leaving a sailing vessel to go down the mid-channel, is to supersede the rule.

There are, however, one or two points on which I think it right to give you my opinion, because they are not matters of nautical skill, but questions of law.

It has been endeavoured to be impressed on your minds, that the master of the *Charles* was not on deck at the time of the collision; that all matters were in confusion; that this accident arose from an erroneous judgment, and therefore the blame must rest on the *Charles*. My opinion, which I am bound to give you, is that the master was on deck, and for this plain and obvious reason: it is distinctly sworn to by himself and six others, and appears from the whole *res gesta* and the conversation he had with Brown the waterman, and against that is opposed nothing but the declarations of Brown. Taking the declarations to have been
 • made in the very words sworn to, how far can I put the declarations of a man afterwards not only in competition with his own affidavit, but with the affidavit of six other persons, who swear to that which they saw? So far as the fact can have any bearing upon the decision of the case, I give it as my decided opinion, that the evidence clearly proves him to have been on deck at the time. There is another point which it is necessary to notice. A little has been said as to

neglect after the collision. Giving no opinion as to who to blame, I am not in any degree satisfied that such act took place. Indeed, it is nothing more than a supposition of what might have been the consequences if certain things had been done. But it must be recollected that, the collision, all things were necessarily in confusion, I never can hold parties bound by strict rules as to opinions which persons may form subsequently that another a better course might have been resorted to.

Now, you will have the goodness to tell me your opinion, whether you think the *Charles* was to blame in the case she followed, in putting her helm to port; or whether you think the *Gazelle* was to blame in adopting the plan she adopted—not porting her helm when she first discovered *Charles*.

CAPTAIN WELLER: We both concur in opinion that the *Charles* did right in keeping close to the collier section; had the *Gazelle* acted agreeably to the regulations, she should, by putting her helm to port, have gone to the N.E. of *Charles*, and avoided the collision.

JUDGE COURT.—I pronounce for the damage.

JUDGMENT.

Doctors:—*F. Dyke*, for the *Charles*; *Pulley*, for the *Gazelle*.

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Prerogative Court of Canterbury.

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MOORE v. KING.—*Allegation*.—This was a business of A Codicil attested by one witness, who g, by Mr. Charles Henry Moore, one of the executors, subscribed in presence of the testator, being alone with him; r executor, and also the residuary legatee named in the on a succeeding day, attested . The Court had been moved (November 7th) to decree and subscribed by another witness, in the presence of the testator and of the state of the papers on an *ex-parte* motion, which it read, and directed that the papers should be propounded. suit was, therefore, a friendly one. An Allegation stood for admission, which pleaded as follows: that the

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first witness, who did not then subscribe, but pointed to her signature, and acknowledged it:—
 Allegation propounding the paper rejected.
 — Power of acknowledging signature given to testators by § 9 of the Act, not extended to witnesses.

deceased died 16th August, 1842; that, on the 22nd March, 1841, he duly executed his will, and on the 1st September, 1841, a codicil thereto, whereby he bequeathed to S. D., wife of W. D. (an old servant), an annuity of £20, and to her daughter, H. D., £150; that, on the 5th August, 1842, the deceased was confined to his bed by illness, and intending to execute a further codicil, thereby to bequeath further legacies to S. D. and her daughter, he requested his sister, Mrs. C., who was attending upon him, to bring him pen, ink, and paper, as he wished to write a codicil to his will; that Mrs. C. thereupon brought to him writing materials, and the deceased then, with his own hand, wrote and subscribed the paper (A) propounded, in the presence of Mrs. C., who, at his request, subscribed her name thereto, in the presence of the deceased, but no other person was then present; that, about half an hour afterwards, on the same day, Mrs. C., at the request and from the dictation of the deceased, who was too weak to express all his wishes at once, wrote a paper (B), now appearing written on the same sheet, after the writing A., and the same was thereupon signed by the deceased alone; that, on the 8th August, 1842, Sir D. D., who was attending him as his physician, paid him a visit, and the deceased then requested Mrs. C., who was in the room with them, to give him the paper (A), which the deceased shewed to Sir D. D., and addressing him, in the presence of Mrs. C., said to him, "This is a codicil to my will, signed by myself and my sister, as you will see at the bottom of the paper; you will oblige me if you will also add your signature, two witnesses being necessary;" that Sir D. D. assented, and placed the paper on a chest of drawers by the deceased's bedside, in order to affix his signature to the paper; that Mrs. C. stood beside Sir D. D. at this time, and, in the presence of the deceased, pointing to her name in the codicil (A), said, "There is my signature, you see; you had better place yours underneath;" that Sir D. D. thereupon subscribed his name to the paper (A), in the presence of the deceased, and then turned over the paper to sign the part marked (B); that Mrs. C. thereupon pointed to the signature of the deceased ap-

pearing thereon, and said to Sir D. D., " You must write your name under Henry's, for I have not signed this codicil ;" and that Sir D. D. thereupon subscribed his name thereto in the presence of the deceased : and the Allegation concluded by pleading that paper (A) was duly executed according to law, as a codicil to the will.

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Paper (A) was to this effect :—

Paper (A).

I leave Mrs. D. [of, &c.]* £10 more than I left her by my Codicil to my Will [to make her annuity thirty Pounds a year instead.] I also give to her daughter and my God-daughter, H. D., £100 more than I have left her by the Codicil to my Will. Henry Robert King.

S. C.

Witness,

D. D.

Paper (B) was as follows :—

I also bequeath to W. E. £100, and £50 each to L. F. and C. Paper (B). M. I give my Gold Watch that I generally wear to my Godson, J. R. K., and my other [watch] left me by my father to my Brother, J. W. K. Also to A. B. I leave £30, and Mourning rings to my Grandmother, J. H., and my Sister, S. C.

Henry Robert King.

Witness,

D. D.

Two other testamentary papers, containing bequests, one (C) dated 6th August, 1842, signed by the deceased, and written and attested by Sir D. D.; the other (D) without date or signature, written by S. C., the deceased's sister, were annexed to Mr. Moore's Affidavit of Scripts.

R. Phillimore, D., against the Allegation. Two questions arise as to these testamentary papers ; first, does the Will Act (§ 9) require that both witnesses should be present at the same time when they attest ? secondly, does the gesture of the witness in this case (Mrs. C.), in pointing to her name, accompanied by the words " There is my signature," constitute such an acknowledgment as is valid in lieu of signing ? Under the liberal construction of the Statute of Frauds† by Courts of Equity and Common Law, it came to

ARGUMENT.

* The passages enclosed within brackets were interlined.

† 29 Car. 2, c. 3.*

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be considered that an acknowledgment by a testator of his will was equivalent to signing, and hence it was held that, when witnesses attested the acknowledgment, they attested the signing of the will. The safe mode of construing the Stat. 1 Vict. c. 26 is by comparison with the Stat. of Frauds. A greater degree of strictness was intended by the Legislature in the present statute. The word "shall," sec. 9, in the branch of the sentence relating to witnesses, is imperative, and has been so held by the Court in *re Allen*.* The history of the word "acknowledge" was dwelt upon in the recent case of *Hott v. Genge*.† The cases are given by Mr. Roberts,‡ and fully explained, from *Lemayne v. Stanley*§ down to *White v. The British Museum*.|| That of *Grayson v. Atkinson*¶ is an instructive case as to the attestation of an acknowledgment. In *Parke v. Mears*** and in *Grellier v. Neale*,†† acknowledgment of the instrument was held equally valid with acknowledgment of signing, in a deed. The other side must shew that, under the Statute of Frauds, the acknowledgment of attestation was equivalent to attesting. The words of the statute are, that the deviser shall sign and the witnesses shall "attest and subscribe." The word "subscribe" points more forcibly to actual handwriting than the word "sign," which is not applied to the witnesses. *Harrison v. Harrison*.‡‡ There is only one case under the Statute of Frauds in which the question arose whether owning his signature by a witness was equivalent to attestation; that of *Risley v. Temple*;§§ but there was no decision on the point. [PER CURIAM.—If the result of that case had been given, it would almost seem to go the whole length of the present question.] If there was a doubt under the Statute of Frauds, it is removed by that of Victoria, which expressly allows acknowledgment as to testators, but is silent as to acknowledgment by witnesses: the

PER CURIAM.

* 2 Curt. 331. See also 4 Burn, *Ecc. Law*, 274. Phillimore's Ed.

† 1 Notes of Ca. 579.

‡ On *Frauds*, 382—392.

§ 3 Lev. 1. S.C. *al. nom. Lemayne v. Staneley*, Freem. 538.

|| 6 Bing. 310.

¶ 2 Ves. 454.

** 2 Bos. & P. 217.

†† Peake, *N.P. Ca.* 146.

‡‡ 8 Ves. 185.

§§ *Skin.* 106.

inference, therefore, is, that the Legislature did not mean to extend it to witnesses. In *re Mead*,* the Surrogate held that where one of the witnesses had not actually subscribed the will herself, the attestation was defective. Dxc. 17.
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H. Nicholl, D., in support of the Allegation.—In *re Mansfield*† and *re Simmonds*,‡ the witnesses were not present *animo attestandi*, as in *McCraw v. Gentry*.§ The rules of evidence allow of three different modes of attesting instruments requiring evidence of signature: 1, where the party actually signs in the presence of witnesses; 2, where he makes a mark in the presence of witnesses; 3, where he acknowledges his signature or mark in the presence of witnesses. With respect to the third mode, in *Grayson v. Atkinson*, Lord Hardwicke said: “At the time of making that Act of Parliament, and ever since, if a bond or deed is executed by the person who signs it; afterward the witnesses are called in, and before these witnesses he acknowledges that to be his hand; that is always considered as an evidence of signing by the person executing, and is an attestation of it by them. It is true, there is some difference between the case of a deed and a will, in this respect; because signing is not necessary to a deed, but sealing is; and I do not know it was ever held that acknowledging sealing, without witnesses, has been sufficient. But, notwithstanding, that is the rule of evidence relating to signing. Thus it stands on the words of the clause itself, penned on the common practice and usage in point of evidence as to the signing of instruments which do not require the solemnities of deeds.” Therefore, to have a signature acknowledged in the presence of witnesses deemed equivalent to a signature made in the presence of witnesses is a Common Law right. The Common Law is subject to the controlling power of the Statute Law, which exercises a despotic power over the Common Law; but where it prescribes a mode of doing a thing, leaves it to do it after its own form and fashion. *Viner, Abr. tit. “Construction of Statutes,”*|| says, “It is a good exposition of a statute when the reason

* 1 Notes of Ca. 456.

§ 3 Camp. 232.

† *Ibid.* 362.

‡ *Ibid.* 409.

|| Vol. 19, p. 512 (E. 6), 12—14.

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of the Common Law is pursued." "When a statute wills any thing to be done generally, and does not appoint any special mean, it shall be granted according to the course of the Common Law." "Statutes that are made in imitation or supply of the Common Law shall be expounded according to the law." Lord Coke says,* it is a maxim of the Common Law, that "a statute made in the affirmative, without any negative expressed or implied, doth not take away the Common Law." In 1540† and 1542,‡ the Statute Law imposed two manacles upon the Common Law, by the Statutes of Wills, which, being restrictive of the Common Law, must be construed strictly in favour of the Common Law. Lord Coke elsewhere says,§ "There is also a diversity between an Act of Parliament in the negative and in the affirmative; for an affirmative Act doth not take away a custom; as the Statutes of Wills, of 32 & 34 Hen. 8, do not take away a custom to devise lands, as it hath been often adjudged." A modern Act, 3 & 4 Will. 4, c. 106, "for the Amendment of the Law of Inheritance," illustrates Lord Coke's doctrine. In 1676, the Statute of Frauds passed, *in pari materia* with the Statute of Wills; and being restrictive of the Common Law, is to be construed in favour of the Common Law; it was so held by Lord Nottingham in *Ash v. Abdy*.|| The requisites of the Statute of Frauds are, that the will shall be signed by the devisor or by some other person in his presence, and by his express directions. It became necessary to know how the Common Law would deal with the Statute, in respect to signing. What were the modes of signing? First, the devisor actually signed; secondly, he made his mark; and the Courts of Law held that good. A difficulty had been raised; it was contended that it was necessary to prove that the party making a mark was not able to write; but the Courts of Law held this not to be necessary. *Baker v. Dening*.¶ Then the devisor resorted to a third mode, by acknowledging his signature, and the Courts of Law and Equity held that to be good. Now comes the case of the witnesses, who are to attest and subscribe in the presence of the devisor.

* 2 Inst. 200.

† 32 Hen. 8, c. 1.

‡ 34 & 35 Hen. 8, c. 5.

§ Co. Litt. 115 a.

|| 3 Swanst. 664.

¶ 8 Ad. and E. 94.

My notion of attesting is, the being present and attending to what is done by the testator ; and subscribing is, putting a mark to the instrument, to enable them to swear that it was the same. They (first) actually signed, or (secondly) put their mark. *Harrison v. Harrison* ;* *Addy v. Griz*.† Then (thirdly) could the witnesses acknowledge their subscriptions ? I know of no case but that cited from Skinner, which is not against me, and therefore I will examine the third point upon principle. *Lex nunquam coegit ad impossibilia*. The Courts of Law attach but little importance to parties, who attest a deed, subscribing in the presence of the party executing, and the witnesses as often as not carry the instrument into another apartment, and write the attestation there, subscribing their names, to enable them to identify the instrument and swear that it was the very instrument signed in their presence, and they write their attestation to shew, in case of their death, that all that is purported to have been done was done. But the Statute of Frauds required that the witnesses should subscribe in the presence of the devisor. The act of the witnesses is not of so much importance as the act of the party executing ; and if there were three modes of a party's executing, there were, or ought to have been, three modes of witnessing the act. I will put an extreme case against myself. Suppose a party, travelling in an obscure part of the country, becomes dangerously ill, and a will is made for him, and having with difficulty procured three strangers to witness it, the three persons, being present, agree to attest the will, and the testator acknowledges his handwriting, and that the will was his, and requests the three persons to subscribe their names, in token of attestation. Suppose they should answer : " We are willing to do so, but it is a custom in our parts to acknowledge our subscription, and we will take the paper into another room, and bring it back and acknowledge to you our signatures ; and if you refuse this, we will not do as you ask ; we have taken your acknowledgment, why not take ours ? " The testator accedes ; the witnesses sign in another room, bring the paper back to the

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† 8 Ves. jun. 504 a.

Dec. 17. *Moore v. King.* testator, and acknowledge their signatures. The will is disputed, and comes before the arbitrator. What would a Court of Common Law say? "We decide against the Statute Law, which is restrictive of the Common Law, and to be construed strictly against the Statute Law, and if there are three modes in which a deviser can execute a will in the presence of witnesses, there are three modes in which witnesses may subscribe, and there are no negative words in the Statute." Then in the case of *White v. The British Museum*, it was held that a testator might acknowledge the instrument to be his will without producing it to the witnesses, and if the signature was to the will at the time, this was a good acknowledgment. The Statute Law started at this decision, and the Act of Victoria was passed, venting its spite against the Common Law. This Statute is *in pari materia* with the statutes of Wills and of Frauds, and imposed further restraints on the execution of wills. Then how stands the Common Law mode of signing under the Statute of Victoria? First, the testator may actually sign; or, secondly, make his mark (which the Court holds good); or, thirdly, acknowledge his signature, which the statute affirms. Then the witnesses may, first, sign; secondly, make their mark; but when it came to the third mode, of acknowledging the signature, a question arose. Now this was a right under the Statute of Frauds: is it taken away by express enactment? Is there an implied negative? The interpreting language of the Statute of Frauds will furnish a key to the meaning of the Statute of Victoria. If the Court will take the interpreting language of the Statute of Frauds and apply it to the Statute of Victoria, it will see that the words in the latter affirming that the signature of the testator may be acknowledged in the presence of two witnesses, seems to controvert the decision in *White v. The British Museum*, and to require the exhibition of the testator's signature to the witnesses. If there is taken away from the deviser the privilege of acknowledging his signature without exhibiting it, must there be taken away the privilege of the witnesses to acknowledge their signature? The 9th sec. enacts that "no will shall be valid unless it shall be

in writing and *signed* at the foot by the testator." If it had ended here, no witnesses would have been necessary; it therefore provides, "*and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time;*" that is, it shall be signed in their presence; the expression "*such signature shall be made*" being employed to accommodate the language to the ensuing alternative mode, "*or acknowledged.*" The first alternative mode must be thus read: "no will shall be valid unless in writing and signed at the foot or end, and (moreover) unless it be signed by the testator in the presence of two witnesses present at the same time." The Legislature could not mean that a testator might sign without shewing his signature, because they go on to affirm that he may acknowledge his signature; which cannot be done without shewing it. Then I propose to exclude the absurdity of complying with the first alternative mode, namely, by signing and not shewing a signature, by deducing from the second alternative a negative by implication, that a will shall not be signed without shewing the signature. Having, then, deduced *one* negative by implication from the words "*or such signature shall be acknowledged by the testator in the presence of two witnesses,*" I argue that the force of these words is exhausted, and that you cannot deduce from them a *second* negative by implication, that the witnesses shall not acknowledge their subscriptions. As to the intention of the Legislature, Viner* states, as *per* Saunders, C.B., "the intention of the makers may be collected from the cause or necessity of making the Act, or by the words in other parts of the Act, or by foreign circumstances." I therefore submit that the acknowledgment of the signature, in this case, is equivalent to the making of it, in the presence of the other witness.

SIR H. JENNER FUST.—The question before the Court is JUDGMENT. of very great importance with respect to the construction of the Statute, 1 Vict. c. 26, by which this and other Courts are to be governed in the determination of all questions as to the due execution of wills of real as well as of personal

* 19 Abr. 519.

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Distinction
of present case.

The present case differs, as far as I understand it, from any preceding case. In *Allen's case*, the signature having been attested by one witness one day, who signed in the deceased's presence (being alone with her at the time), the next day, the deceased acknowledged her signature in the presence of that witness and of the other, both being then present at the same time, the first witness not referring to her attestation at the time, nor acknowledging her signature, and the second witness on that day attesting it alone. The Court was of opinion in that case that the execution was not sufficient within the provisions of the Statute. In this case there is a material distinction, the deceased having, in the first instance, signed the codicil in the presence of his sister, who wrote the paper (B) from his dictation, and who subscribed paper (A) in his presence, and, on a subsequent day, he acknowledged his signature to another witness in the presence of the sister, who said, in the presence of the deceased, pointing to her name to the paper (A), "There is my signature, you see; you had better place yours underneath." [*Nicholl*. The deceased had acquainted himself with the law of wills.] The deceased did not at this time desire his sister to be a witness. There is this distinction between the present case and that of *Allen*, that though the sister (who attested the signature of the deceased the first day) did not attest and subscribe the paper, in the literal sense of the terms, on the second day, she did point to her signature and acknowledge it: "There is my signature, you see." The question is, whether this is a sufficient attestation and subscription within the 9th sec. of the Statute.

Admitting all that has been said as to the construction of Statutes and the interpretation put upon the Statute of Frauds as to the acknowledgment of a will by a testator, as a substitute for signing, in the presence of witnesses, there

remains the question whether, under the present Act, the same interpretation is to be put upon the subscription of witnesses. Dxc. 17.
Moore v. King.

We all know that, under the Statute of Frauds (which, it has been contended, is *in pari materiâ* with the Act of Victoria), where it was required that a will should be signed by the testator, and attested and subscribed by three or four credible witnesses, it was held that the signature of the deceased might be at the top of the will: it was quite sufficient for the testator to say, "I, so and so, do declare this to be my last will and testament." The necessary consequence would be, that the witnesses called to attest the will, in such a case, would not see the signature of the deceased; therefore, an acknowledgment of the paper being his will would be in fact an acknowledgment of the paper having been signed by him, and such an acknowledgment was held to be sufficient. But the doubts which arose under that Act, and the construction put upon it, namely, that the deceased's acknowledging the paper to be his will was sufficient, seem to have created the necessity of passing the Act of Victoria, though the decision of the Judges in *White v. The Trustees of the British Museum* was the immediate cause (as I understand) of passing the Act—that is, it is stated in the Report of the Commissioners on the Law of Property, that it was proper that the doubts should be removed. Requisites of
Stat. of Frauds.

Doubts led to
passing present
stat.

Now this is an Act "for the amendment of the laws with respect to wills;"—not an original Act, but to amend the law, and in many instances it has made great alterations in the law, in order to remove doubts as to what shall be sufficient to the due execution of wills, and in the 9th section of this Act, there is a departure in words certainly, and I think in meaning also, from the corresponding section of the Statute of Frauds; for by that Statute it was enacted, that "all devises and bequests of lands or tenements, &c., shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the devisor by three or four credible witnesses." So that what The altera-
tions made
thereby.

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that Statute required was this:—that the will should be in writing; that it should be signed by the party; and that it should be attested and subscribed by three or four witnesses in the presence of the deviser. It did not say that the will should be signed in the presence of the witnesses by the deviser, but that it should be signed by him and attested in his presence. Doubts then seem to have arisen as to what was sufficient for a due execution, and it was held that an acknowledgment of the will by the testator was sufficient; that the witnesses need not attest in the presence of each other, but might attest at three different times; if the testator made his signature in the presence of one witness, and afterwards acknowledged the will in the presence of another witness, and again in the presence of a third, this was a sufficient compliance with the Statute of Frauds. He need not have acknowledged the will in the presence of the three witnesses present together; he might sign in the presence of one, and acknowledge in the presence of the other two at different times. But great doubts having arisen, the Act of Victoria was passed to remove them; its object was to leave no doubt, to make every thing plain, and to afford no room for the interpretation of the law by Courts. Let us now see how this object has been accomplished.

Its enact-
 ments.

The present Statute enacts (sec. 9) that “no will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof.” What was the object of this? To remove the doubts which had arisen under the Statute of Frauds, by the construction of which the name of the deceased placed at the top of the will was held to be a sufficient signature. Now, the will must be signed at the foot or end, and the signature at any other part than the foot or end will not be sufficient: “by the testator”—the words in the Statute of Frauds; “or by some other person in his presence and by his direction:”—the words in the Statute of Frauds are, “or by some other person by his express directions.” Then as to the signing, the Statute does leave it here to a Court to interpret what amounts to signing, or what shall be equivalent to signing—whether by a

mark or in any other mode, and I have held that a mark would be sufficient in the case of a testator or of a witness. But this is not all; for, to remove all doubts whether an acknowledgment by a testator would be sufficient, the Act has expressly directed that "such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator." Now here is a doubt removed, whether an acknowledgment is a sufficient execution; it is to remove the doubt which existed under the former Statute, that this Act provides that an acknowledgment of the signature by the testator, in the presence of two or more witnesses, shall be sufficient. I refer to this to shew that the true intent of the Act is to remove as far as possible all doubts and to take away all latitude of discretion. The signing is to be in the presence of two or more witnesses (thus reducing the number of witnesses from "three or four" to two), and the signature must be made in the presence of two or more witnesses, or an acknowledgment of the signature in the presence of two or more witnesses will be sufficient. Then there is an additional requisite, not to be found in the Statute of Frauds (and upon which several cases have turned), namely, that the signature or acknowledgment must be made in the presence of two or more witnesses "present at the same time." I have adverted to the construction given to the Statute of Frauds, that the signature might be made in the presence of one witness and afterwards acknowledged in the presence of other witnesses not present at the same time. That doubt is also now removed; it is enacted that the witnesses must be present at the same time, and the Statute goes on to enact, "and such witnesses shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary." Now the question really is, what is the meaning and interpretation of this part of the section, as to the attestation and subscription of the witnesses in the presence of the testator?

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Its object, to
take away
doubt and dis-
cretion.

I cannot but think that, where the object of the Act is to remove all doubt and latitude of interpretation, the real and

Dec. 17. *Moore v. King.* true meaning is, that, two witnesses being required to be present at the same time, when the signature is made or acknowledged, they shall *then* attest and subscribe—not, as in the case of *Allen*, that the will may be signed before one witness, who shall attest it, and acknowledged before another, at a different time, who may alone attest it. The question here is, whether a signature made in the presence of the testator by one witness one day, and an acknowledgment of her signature by that witness on another day, in the presence of another witness, who signs, is a sufficient compliance with the Act. I am inclined to hold that it is not, and that unless both the witnesses attest and subscribe in the presence of the testator, when he made or acknowledged his signature, it is not sufficient. If Mrs. C. had made her signature on the second day (supposing she had attested on the former day), it would have been a good attestation; but where she was only present and pointed out her signature, it is not what is meant and intended by this section. The acknowledgment of the will by the testator was held sufficient under the Statute of Frauds; but here the Act has pointed out the mode by which the testator must acknowledge his signature, and no latitude of interpretation is allowed. No such mode, however, is recognized in the section with respect to witnesses, and when I find that the Statute itself says, “and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time,”—that that would be a sufficient signing under the Statute, and I find no such

Acknowledgment of signature by a witness not sufficient.

words to justify acknowledgment by witnesses, I am of opinion that the acknowledgment of his subscription by a witness, in the presence of the testator, and of another witness, is not a sufficient compliance with the Act.

The question at this moment is as to the admission of this Allegation, and, as I have no doubt of the true interpretation of the Statute, this would lead me immediately to reject the Allegation; and therefore, being of opinion that the paper was not duly attested by two witnesses subscribing in the presence of the deceased at the same time, I must reject the Allegation.

But there is a circumstance in the case respecting which I should like to have some explanation, and if I had a doubt of the case, I should let the Allegation go to proof; for it appears that, a day or two before the deceased acknowledged his signature in the presence of Sir D. D., another paper (C) was written by the sister, and only subscribed by Sir D. D., the sister not subscribing the paper: what is the reason Mrs. C. did not subscribe that paper? [*The Proctor*. The reason is stated in the affidavit: the paper bequeaths a legacy to her.] Then how can it be said that the deceased had satisfied himself as to the law, which required two witnesses, and yet, knowing it was necessary to have two witnesses, he does not have this paper attested by a second witness?

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I have no doubt in my own mind as to the interpretation of the Statute. I reject the Allegation, on the ground that it is not sufficient for the purpose for which it is offered to the Court, since, if the facts were proved, they would not enable the Court, however it might wish to do so, to give effect to the codicil.

Allegation
rejected.

Proctors:—*Nicholl*, for Mr. Moore; *Toker*, for Mr. King.

HOOLEY AND MACQUIGGIN v. JONES AND JONES. — *Cause*.—The deceased, John Evans, otherwise John Evans Jones, of Tyny Coed, Llandudus, Carnarvon, died 25th May, 1840, about seventy years of age, leaving Elizabeth Jones (wife of William Jones) his only child. On the day before his death, he made a will, but Mrs. Jones, having been advised that it was invalid for want of due attestation, in July, 1840, took out Letters of Administration of her father's estate as dying intestate. In Hilary Term, 1842, a Monition was taken out on the part of Ann Hooley, widow, and Elizabeth Macquiggin, widow, sisters of the deceased, and legatees in the will, calling upon Wm. Jones, the executor according to the tenor, to bring in the will and to accept or refuse probate, and a decree was taken out against Elizabeth Jones, to bring in the Letters of Administration, and shew cause why they should not be revoked. The

A will, bearing on the face of it the signature of the drawer and the mark of a witness, pronounced invalid, the drawer having signed previous to execution, and not as an attesting witness.

Dxc. 17. paper in question was executed by a mark at the end, on the left hand of which appeared the following words: "This was wrote by Wm. Prichard, shopkeeper;" then followed, below, "Witnesses," and the mark of William Williams. The property was under £700.

Hooley v. Jones.
Allegation. The Allegation propounding the will pleaded that the will was drawn by William Prichard, and read over to and approved by the deceased, who subscribed his mark thereto, in the presence of Wm. Prichard and Wm. Williams, both present at the same time; that, after he had so subscribed, Prichard, by the desire and in the presence of the deceased and of Williams, wrote the names "John Evans" and "witnesses, William Williams," and to the latter name Williams subscribed his mark in the presence of the deceased and of Prichard, as a witness to the execution; that, immediately afterwards, Prichard, also in the presence of the testator and Williams, wrote the words "this was wrote by Wm. Prichard, shopkeeper," thereby, in fact, subscribing his name as a witness to the due execution of the will.

Jenner, D., for the legatees, in support of the will.
Addams, D., contra, for the daughter.

JUDGMENT. **SIR H. JENNER FUST.**—This is the will of a Welchman, written by a neighbour, a shopkeeper, who was not acquainted with the mode of executing wills. The deceased, it appears, dictated the will in Welch, and it was written in English, and read over to the deceased in Welch and English. At the side of the deceased's signature are the words "This was wrote by Wm. Prichard, shopkeeper." Whether this referred to his being a witness to the will, or to his having written the whole of the will, might have been doubtful, on the face of the paper, before the Statute. But it turns out, on the evidence of the witnesses, that when Prichard wrote the words, he never intended to attest the execution of the will, but only to shew that he had been the writer of the will from the dictation of the deceased. Prichard himself says: "I observed to William Williams, that I had better set my name to the will, to shew that I had written it, and I did so, in the presence of William Wil-

No animus attestandi.

liams and of the deceased, and *then*, having filled in the date, I took the will to the deceased, for him to sign it." Upon interrogatory. he says: "I was not aware that, in order to make a will valid, it must be attested by two witnesses: I did believe that one witness only was required to make a will valid." He says further: "I wrote my name to the will to shew that I was the writer of it; I did believe that, as I was the writer of the will, I could not become a witness to it." Then he distinctly states that he wrote the words before the deceased signed the will: "I did write the words 'This was wrote by Wm. Prichard, shopkeeper,' previous to the deceased making his mark or cross: I wrote these words not for the purpose of attesting the deceased's mark or signature, because the deceased had not then made his signature; but I wrote them to shew that I was the writer of the will."

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Hooly v. Jones.

Under these circumstances, I do not think it is possible for the Court to say that this is a will signed by the deceased in the presence of two witnesses, and attested and subscribed by them, as the witness Prichard expressly says it was not so attested. I am of opinion that the evidence is not sufficient to support the will, and I pronounce against its validity. The costs to be paid out of the estate.

Will pronounced
against.

Proctors:—*Wadeson*, for the legatees; *Blackburn*, for the administratrix.

High Court of Admiralty.

DECEMBER 20.

THE "BEULAH."—*Act on Petition.*—On the 3rd August last, the Court awarded to the owners, master, and crew of the steam-tug *Copeland*, belonging to the Shipowners' Steam-tug Company, the sum of £500 for salvage services rendered to the *Beulah* transport, which had got ashore. The Company had distributed the sum according to rules laid down by themselves, whereby they (the owners) took

Salvage. —
Apportionment. — A scale of distribution by owners of a steam-tug (the salving vessel) altered.

Dec. 20. £415, and allotted £85 to the master and crew. Of this
The Beulah. latter sum the master claimed five per cent. poundage (£25) on the whole, and the engineer two per cent. (£10), and of the remaining sum the captain took one-third. Four of the crew, to whom a sum of £4. 15s. 3d. each had been allotted as their proportion, now applied to the Court for a more equitable apportionment.

ARGUMENT.

Addams, D., for the owners of the *Copeland*.—Salvage services are within the ordinary duties of the crews of these steam-tugs. They are liberally paid, and, though unemployed, their wages run on. It is well known to these men, since it is stated to them when taken into employment, that, in cases of salvage, unless under particular circumstances, the rewards will be divided according to the Company's rules, with which hitherto all have been satisfied. [PER CURIAM. What is the ground for deducting poundage? You first give the master £25, and then one-third of the remaining sum.] The master, besides his judgment and skill, incurs great responsibility.

Haggard, D., for the mariners. They are entitled to a more liberal reward out of £500, and so large a proportion as £415 should not be appropriated to the owners. In other cases, the apportionment has been made according to wages. The "*Albion*;"* the "*Howard*;"† the "*Mary Somerville*."‡

JUDGMENT.

DR. LUSHINGTON.—I confess, I exceedingly regret that this question has arisen, because I doubt whether it be possible, by any decision which I shall pronounce, to lay down any thing in the nature of a rule which would govern similar cases of this nature in future. I think the present question is distinguished from those which have been cited, and for the reasons I am about to state. The service for which the sum of £500 was allotted was a service in the nature of towage. The *Beulah*, the vessel salvaged, having got upon the sand some distance below Dover, the *Copeland*, belonging to the Steam-tug Company, was hired for the purpose of assisting her, by dragging her off the sand, and finally bringing her to the port of London. The service, therefore,

* 3 Hagg. A. R. 254.

† *Ibid.* 256 n.

‡ Feb. 8, 1839.

was of the nature of towage, and principally effected by the steam-vessel herself. Dec. 20.

The Beulah.

Principles.

In former times, before the introduction of steam-vessels, the principles laid down by my predecessors, over and over again, were, that a salvage service was to be considered almost as entirely rendered by the individuals who composed the crew (including, of course, the master); and it was only "incidentally," to use the words of Lord Stowell, that a claim on the part of the owners of vessels was allowed to be entertained. But there was a strong and obvious reason for the adoption and maintenance of that principle; for, in fact, the services generally (not universally) consisted of personal labour, personal exertion, and consequently personal risk. There were cases, indeed, in which the ship herself to which the salvors belonged rendered considerable service, but these cases were always considered as a sort of exception to the general rule; and one of the reasons which I recollect being assigned by Lord Stowell, in support of this principle, was, that a merchant vessel, rendering assistance to another vessel in distress, might probably, at a future period, require similar aid. That was the principle in former times. But, with regard to steam-vessels, it appears to me that the very nature of the service they perform is totally different. In the case of ordinary steam-vessels—I am not speaking of vessels employed for the purpose of towing ships up the river or down the Channel—it is obvious that, in the great majority of cases, the service is rendered by the power of the steam-vessel herself, and does not arise from any extraordinary exertions made use of by the master and crew. As applied to steam-vessels; With regard to the vessels of this particular Company to which the *Copeland* belongs, they are distinguished from ordinary steam-vessels in this important point, that the occupation for which they are destined is that of towage; and I think it has been truly observed by Dr. Addams, that, in many cases, towage and salvage are nearly connected, though the line between the two may be drawn, and, indeed, has been drawn in this Court. I recollect taking the distinction myself, in a case* where the card of a Steam Company was exhibited, stating their prices for towing vessels, and I held

* The "*Reward*," 10 *M. Law Mag.* 61.

Dec. 20. that the Company were not bound by the rate stated, in a salvage service, but were entitled to a much higher rate in the nature of salvage.

The Beulah.

Arrangement
between owners
and crews.

I should further observe, that it has been stated that the rate of remuneration to the crew engaged in services of this description is to be governed by an arrangement made between the owners of the vessel and the people on board. Of course, that is open to very considerable exceptions. It was truly stated by Dr. Addams, that there must be exceptions in cases of extraordinary personal risk; and I am also of opinion that there must be exceptions in cases of very extraordinary labour. I cannot consider myself bound by any arrangement that the owners might make with the mariners, because I apprehend that the latter are entitled to the judgment of this Court as to what it thinks equitable and as to the principles which ought to govern each particular case. At the same time, I must confess that I should be exceedingly reluctant indeed to disturb an arrangement hitherto carried on with satisfaction to all parties, and which, as far as I find, has been productive of nothing but an harmonious result. I cannot lay out of my consideration an important fact, which makes a material difference in a case of this kind—namely, that it has been sworn, and not contradicted, that the persons on board these steamers receive their wages whether in sickness or in health, and they are therefore in a very different situation, in many important respects, from ordinary mariners. I wish it to be understood that if, unfortunately, any such case as this should again occur, I undoubtedly shall make an exception to any arrangement which has been formed between the parties, not only where there has been great risk, but also where there has been extraordinary labour; but these are the only cases in which I shall do it: where there is no great risk or extraordinary labour, I shall think it my duty to adhere to the arrangements with respect to *quantum* which have hitherto been acted upon by the parties.

The cases.

With regard to the cases cited by Dr. Haggard, I do not think that they have any application to the present case. In the case of the "*Howard*," £2,000 was given. The

Court allowed £1,000 to the owners and £500 to the master, who was a naval commander, and who appears to have conducted himself with considerable skill in the service; the remaining £500 was distributed amongst the crew. That was an arbitrary decision made by Sir John Nicholl, according to the special circumstances of that particular case, and which it would be utterly impossible could govern my mind in this instance. With regard to the case of the "*Mary Somerville*," the owners brought in £500, and the only question was as to the mode of distribution; and, if no objection be taken on the ground of a previous arrangement, I apprehend the ordinary course is, to divide the amount of salvage amongst the crew, according to the wages they receive.

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The Beulah.

Having made these observations, I must now address Owners' scale myself to the scale brought in on behalf of the owners. Perhaps, if I could consider myself at liberty to regard the *quantum* allotted without reference to any previous arrangement, I might not think it precisely that which I individually should lay down, if, in the first instance, I had to adjudicate upon it. But, considering that it has been acted upon, and that in this particular case there has been no danger or risk of any kind to the salvors, and no extraordinary labour encountered by the men,—because the risk was to the machinery, not to the individuals on board, for it is clear that, if the machinery had broke, all attempts to pull the vessel off must have been abandoned,—I am not disposed to alter the *quantum*.

There is another part of this case upon which I was desirous of obtaining information, but what I have obtained is not satisfactory to my own mind—I mean the enormous proportion which seems to have been distributed to the master, with reference to the shares of the crew. The master receives £41. 13s. 3d., whereas the stokers on board, and the common seamen, receive only £4. 15s. 3d. If any reason had been assigned satisfactory to my mind for this great distinction, I should have been very reluctant to disturb it; but I cannot be convinced simply by being told that this great difference ought to take place by reason of the great skill the master possesses, the great responsibility

Dec. 20. *The Beulah.* he incurs, and the confidence reposed in him. My opinion is, that this is no reason why he should take so enormous a share. Therefore, as I am to make such an adjudication as I think consistent with the principles of justice and equity, I do not think that 7 per cent. should be taken from the amount. I think that the £25 and the £10 should be added to the £50, making £85, and I make the allotment according to the statement contained in the paper which I hand to the Registrar.* I allow the men their costs.

Proctors: *Rothery*, for the owners of the *Copeland*; *F. Clarkson*, for the mariners suing; *Bowdler*, for the owners of the *Beulah*.

Prerogative Court of Canterbury.

DECEMBER 22.

BIRKHEAD v. BOWDOIN.—*Cause.*—The testator, Mr. James Temple Bowdoin, formerly of Boston, in the United States, and late of Bath, died 31st October, 1842, aged 60, a widower, leaving three major children. For several weeks preceding his death, he had been confined to his room by illness, and on the 16th October, intimating to Sir William Clay, his brother-in-law (at whose house he was then residing), his intention of altering his will, he requested him to write a new will for him; and unlocking and taking from a portfolio, which he kept in his bedroom, his then existing will (A), dated 10th September, 1838, and referring to it, he dictated to Sir William Clay, who began to write a new will. After he had proceeded beyond the revocatory clause, and had completed the provision for his children, save only the bequest of the residue of his personal estate, he directed that his executors should pay out of such personal estate all the legacies (or so

Part of a former will, revoked, referred to in a later will, which excepts such part of the former will (containing a list of legacies) from the revocatory clause,—held to be a subsisting portion of the will, although the signatures of the first will torn off after execution of the later will.

* The effect of this allotment was to give the captain one-third, and to distribute the remainder in equal shares amongst the crew, the boy receiving only half a share, the other half being divided between the first mate and the engineer.

many of them as should not by the death of the legatees have lapsed prior to his decease) as were mentioned in his former will (referring to paper (A), which he said was such former will), with the exception of the legacies thereby given to his two daughters, inasmuch as he had by his new will already provided for them. Upon the deceased expressing himself to that effect, Sir Wm. Clay (who was not aware who were the legatees so alluded to) suggested that it would be better to embody from the former will the legacies so referred to; but the deceased (actuated, perhaps, by the desire of concealing from Sir William that he and Lady Clay were legatees) refused to have it so done, and he being very unwell, Sir William, unwilling to press the matter, went on to complete the will, referring, as the deceased dictated, to the former will for the legacies to be paid out of the residuary estate. The new will, being duly executed and attested, was taken by the deceased, who folded it up with the former will, having first torn the signatures from the bottom of each sheet of the latter, and deposited them in the portfolio, of which he kept the key. On the 25th October, the deceased, in the presence of Sir William Clay, unlocked the portfolio, and producing both the new and former will therefrom, requested Sir William to enclose them in an envelope, and deposit the packet at his bankers'; and on the papers being enclosed and sealed up, in the presence of the deceased, Sir William Clay, from his dictation, wrote on the envelope (B) these words: "The Envelope. within papers constitute the last will and testament of me, James Temple Bowdoin, deposited 25th October, 1842, with my bankers, Messrs. Stone, Martin, and Co., and not to be opened except in the presence of two of my executors, unless by my special order:" which endorsement the deceased then signed. The packet was on the same day deposited at the banking-house of Messrs. Stone, Martin, and Co., where it remained unopened till 2nd November, when it was brought by the executors to their Proctor, who, in their presence, cut open the envelope, and took therefrom the two papers.

Dec. 22.

*Birkhead v.
Bowdoin.*

The will of 1842 commences by revoking "all wills, co- Will of 1842.

Dec. 22.

*Birkhead v.
Bowdoin.*

dicils, and other testamentary dispositions made by the testator at any time or times heretofore ;” it appoints Sir William Clay, Mr. Jos. Blunt, Mr. Benj. Birkhead, and Captain James Temple Bowdoin, 19th regiment (the testator’s son), executors ; and the words of reference therein to the former will are as follow : “ I further direct my executors to pay out of my residuary estate all the legacies (or so many thereof as shall not by the death of the parties have lapsed prior to my decease) contained and enumerated in a paper which will be found herewith, dated 10th September, 1838, and which I had intended for my will, but which (as above stated) is revoked by my present will for all other purposes than as a mere list and enumeration of the legacies I wish to be paid by my executors, excepting only the legacies given to my two daughters in the said paper, and which I revoke, as by this my last will and testament I have otherwise provided for them.” The testator executed a codicil on the 27th October, making some addition to the bequests to his daughters. The personal property within the province was about £10,000.

Codicil.

Nov. 15.

On the second session of the Term, the case came before the Court on *ex-parte* motion.

MOTION.

Pratt, D., prayed the Court to decree probate of the will dated 16th October, 1842, and the paper (A), as containing together the will of the deceased ; citing the case of the *Countess of Durham*.*

DECREE.

SIR H. JENNER FUST.—This case is not under the same circumstances ; here is an express revocation of “ all wills, codicils, and other testamentary dispositions.” We seem to have forgotten that there is such a thing as an Allegation ; all these questions are now brought forward on motion ; it is highly expedient that the practice should be brought back to what it was, and that these questions should not be decided upon *ex-parte* motions. I am clear that, in this case, it is not advisable to grant the motion.

Such motions
irregular.

I am quite satisfied that what was done was done by the deceased’s own direction ; that he directed Sir Wm. Clay not to recapitulate or enumerate the legacies from the old

* 1 Notes of Ca. 365.

will, and that he gave directions that "all" those legacies, except the legacies to his daughters, should be paid by his executors under his will; this case differs, however, from *Lady Durham's Case*, in which she directed that a part of a will of her late husband should be considered as part and parcel of her will. It appears that both the papers were delivered to and received by the deceased, and folded up by him, with directions that they should be enclosed in an envelope, which was endorsed, "The within papers constitute the last will and testament of me, T. Bowdoin." But the will of 1842 begins by directly and positively revoking all previous "wills, codicils, and testamentary dispositions." The executors are not the same executors as in the former will. How can I decree probate of that portion of the old will which is declared by the new will, at the beginning, to be revoked, and to persons (one of them at least) not appointed to execute the will? It is clear what was the reason why the deceased would not permit the enumeration of the legacies contained in the old will in the new, because there was a legacy to Sir Wm. Clay. The papers may be entitled to probate, but not on an *ex-parte* motion, as it is a very different case from *Lady Durham's*. We must come back to the old practice. If I were to suffer probate to pass, it might be called in hereafter. I reject the motion.

DEC. 22.

—
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Motion re-
 jected.

The papers were thereupon propounded in an Allegation by Mr. Birkhead, one of the executors, against Capt. Bowdoin, the residuary legatee, pleading the facts before stated, and the three attesting witnesses were examined upon it, including Sir Wm. Clay. This gentleman, in his deposition, stated that, when he suggested to the deceased that it would be better and simpler to enumerate the legacies in the present will than to refer to an old will, revoked in all its essential provisions, the deceased said, "that the papers would be always kept together, and that there could, therefore, be no doubt about his meaning;" that, when the new will had been executed, and the witnesses had left the room, the deceased asked, "May I not as well tear off my signatures

Evidence.

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from my old will?" that he (witness) replied, he had already revoked it effectually, but there could be no harm in his doing as he suggested, inasmuch as the old will could be considered as a mere list of legacies only, just as if they had been written on any other separate sheet of paper; to which he assented. Sir William further deposed: "He most undoubtedly had no intention of revoking the old will so far as those legacies were concerned." The deceased did not refer to the former will in the presence of the other witnesses.

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 ARGUMENT.

Haggard, D., on behalf of the executor.—The evidence puts it beyond all doubt that it was the intention of the testator, in the first instance, to embody and keep alive in his new will certain portions of his former will, and that what was subsequently done was not done *animo revocandi*. The whole transaction shews the object and intention of the deceased.

Pratt, D., on the same side.

Robinson, D., for the residuary legatee.—The circumstances of this case materially distinguish it from others which have been before the Court. There was no allusion to the former will at the time of execution.

H. Nicholl, D., on the same side.

THE COURT (to *Haggard*).—Do you put it that this was an incorporation into the new will, or that the deceased only revoked the old will *pro tanto*? Did the tearing off the signatures *animo revocandi* refer to the whole or a part?

Haggard.—When the testator executed the new will, it is impossible to doubt that he intended that part of his old will containing the legacies to operate. It is clear that he intended one portion of the old will to survive as a list of legacies. On a subsequent day, he executed a codicil, and although it does not expressly refer to the two papers, as parts of his will, yet he refers to his "will," which was then contained in the two papers. [PER CURIAM.—The codicil would not set up again the parts of the will which had been revoked.]

JUDGMENT.

SIR H. JENNER FUST.—The question is, of what papers, or parts of papers, the Court is to grant probate. The will

of 1838, on the face of it, is cancelled and revoked, *prima facie*, and if nothing more appeared, the Court would hold it to have been cancelled altogether *animo revocandi*, and revoked, by tearing off the signatures. The question is, whether, under the circumstances, there is not enough to shew that the act was not done *animo revocandi*—with the intention of revoking the whole, but only certain parts, of the old will. The purport of the later paper is certainly to revoke “all wills, codicils, and other testamentary dispositions” made by the testator “at any time or times heretofore,”—a direct and complete revocation of the former will. He goes on, however, in a subsequent part, to limit the effect of the revocatory clause to certain parts of the old will, retaining the list of legacies, except certain lapsed legacies and the legacies to his two daughters, for whom he had otherwise provided. Sir William Clay suggests that it would be better to recapitulate the legacies referred to in the new will, but the deceased (probably from a motive of delicacy to Sir William Clay, as he and Lady Clay were legatees) declines, and the clause is drawn so as to make the will revocatory as to all other purposes, except so far as relates to the legacies to these particular individuals; it was only a revocation *pro tanto*, and therefore the will would be a good will in every other respect than those in which it was revoked. There was no *animus revocandi* as to the whole will, so that it would be a good will as far as those legacies are concerned.

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Revocatory
clause limited.

Only a revocation
pro tanto.

But it appears an act was done, after the witnesses left the room who attested the second will—all but one, Sir Wm. Clay. A conversation took place between the deceased and Sir William, as to whether the old will should be cancelled, by tearing off the signatures. Sir Wm. Clay thought there would be no harm in this, as the old will was now only a list of legacies, which were directed by the present will to be paid out of the residuary estate. The signatures were accordingly torn off; but, under the Statute, it is necessary that such an act, to constitute cancellation, must be done *animo revocandi*. Here, however, there was no intention to revoke entirely, but only to revoke a part of the

Tearing off
the signatures.

Without intention to
revoke entirely.

Dxc. 22.

*Birkhead v.
Bosdoia.*

will; the other part was to remain in force and operation. Therefore, no *animus cancellandi* accompanied the act of tearing off the signatures; and this case comes, I think, within the principle of *Brooke v. Kent*,* decided by the Judicial Committee of the Privy Council; that is, there was no *animus revocandi* as to the whole paper, but only as to those parts which were not to stand as a portion of the new will, which was not inconsistent with the act of tearing off the signatures. By this subsequent act, he had no intention to revoke the former paper any further than he had revoked it, and this case comes within the principle of the other cases, though the circumstances may differ. In *Onions v. Tyer*,† the will was *primâ facie* revoked, by the seals being torn off, as in the present case, and yet it was held that it was only an act of revocation on the supposition that the new or later will was an operative will; that it was not done *animo revocandi*, but *animo substituendi*.

I am, therefore, of opinion, on the evidence (as to the intention of the deceased there can be no doubt), that the Court is bound to pronounce for the validity of the will and codicil, and of so much of the former will as contains these legacies to particular individuals, which are specifically reserved from the clause of revocation.

The will and
codicil, and part
of the old will,
pronounced for.

Special pro-
bate.

The Registrar.—It must be a special probate, reciting the particular words in the former will not revoked?

THE COURT.—Yes; that part of the will not revoked.

Proctors: *Poynter*, for the executors; *Toker*, for the residuary legatee.

* 1 Notes of Ca. 99.

† 1 P. Wms. 345.

END OF MICHAELMAS TERM, AND OF THE SITTINGS
AFTER THE TERM.

Admission during the Term:—

AS PROCTOR.

NOV. 19.—HENRY CADOGAN ROTHERY, Esq., Not. Pub.

HILARY TERM, 1843.

Prerogative Court of Canterbury.

JANUARY 16.

IN THE GOODS OF CHARLES GOMOND COOKE, DEC. — A will and a codicil, cancelled (the former inadvertently) by the daughter and executrix of the testator, when he was not, though supposed to be, competent to give his assent, — admitted to probate on the motion of the agent in the *testator, ex-parte*.—The testator died 26th December last, a lower, leaving a daughter (the only child), married to P. He left a will, executed 30th July, 1840, and a codicil, executed 22nd December, 1842, on which day he executed the will, some alterations having been made therein. Of the will and codicil (the latter containing a provision for his grandchildren) the daughter and her husband were appointed executors. All the signatures of the testator to the will (on eight sheets) and to the codicil were taken off, under the following circumstances. On the morning of the 26th December (the day of his death), Mrs. P., acting in the testator's bed-room alone with him, he having been confined to his bed, proposed to him the revocation of the codicil which he had recently made, and, understanding her believing that he assented to her request, took the will and codicil, and finding that the will had been re-executed the same day as the codicil, and supposing that its disposition was connected therewith, she inadvertently cancelled both instruments, by tearing off the signatures and initials. Finding afterwards, from the opinions of the medical attendants, that the testator, at the time his supposed consent was obtained to the revocation of the codicil, was in such a state of mental and bodily infirmity that he was incapable of the due performance of an act of business, she and her husband were desirous of obtaining probate of both the papers, in order to carry the intentions of the testator ex-

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Cooke, dec.

pressed therein into effect. This prayer was against their interest, for if the deceased were intestate (there being no other testamentary papers), the whole property, real and personal, would become absolutely theirs, Mrs. P. being sole heiress and only next of kin.

Sir John Dodson, Q. A., supported the motion.

DECREE.

The cancellation a nullity.

Probate with the affidavit.

Not with the name of the testator.

SIR H. JENNER FUST.—The papers are on the face of them revoked, if cancelled by the deceased, or by his directions, *animo revocandi*; but when I look at what is stated in the affidavits of Mrs. P. and of the medical attendants, I am clearly of opinion that the act was not done by or at the desire of the testator at a time when he was capable of giving an assent—when he was capable either of making a will or of revoking a will already made, and the act of cancellation was, therefore, a perfect nullity. It turns out that it was done by the daughter, who states that she supposed she had obtained her father's consent to the cancellation of the codicil, and that, inadvertently, she cancelled the will also; though I am clearly of opinion that the deceased gave no valid consent to the cancellation of either. The interest of the daughter and her husband is certainly opposed to the grant of probate of these papers, for if the deceased were dead intestate, she, as the sole heiress and only next of kin, would take the property. I do not see how the Court can withhold probate; it cannot decree probate to any other person. I have, therefore, nothing more to do than to decree probate of the re-executed will and the codicil, with the affidavit explaining the circumstances of the cancellation.

The Registrar.—Not with the name of the deceased attached?

THE COURT.—No; that will appear in the affidavit.

Addams, D. (a. c.).—In *Brooke v. Kent*,* the Judicial Committee restored what had been cancelled by the deceased.

THE COURT.—In another case, lately, I have declined to go to that extent. I do not consider myself at liberty to insert the signature. There must be a special probate, shew-

* 1 Notes of Ca. 93. N. S. P.

ing the circumstances under which it passed. I wish I could do as suggested for some reasons; for others, perhaps, not.

JAN. 16.

Cooke, dec.

Rothery, Proctor.

Consistory Court of London.

JANUARY 18.

ABBITT AND BAKER v. GURNEY.—*Motion*.—This was an application for a sequestration of the Living of the Rector of St. Clement Danes, at the suit of two creditors, who stated in their affidavit that they had been appointed assignees of the Rev. Wm. Gurney, the Rector, under a decree of the Insolvent Debtors' Court; that he had been for several years in insolvent circumstances; that in May, 1831, he had been discharged under the Act, being directed by the Court to pay £100 per annum to his assignees, for the benefit of his creditors; that several of his creditors being dissatisfied, he had agreed to pay £54 per annum in addition, in full satisfaction of his debts, and a deed of covenant was entered into on the 20th May, 1835, whereby Mr. Gurney consented to pay the two sums, and the creditors gave him a release, provided that, in default of payment, the deed should be void, and the assignees should be at liberty to apply for a sequestration of the Living; that a default of payment had been made, to the extent of £462, there being an arrear of three years to June last; that on the 21st November, a letter had been written to Mr. Gurney stating that this application would be made. Previous to this, a motion *ex-parte* was made to the Court by Dr. Bayford, on the First Session of Michaelmas Term; but THE COURT rejected the motion, observing: "I cannot grant the motion in this form, on the mere averment of Counsel; I cannot assume that the deed was legally executed, or that its covenants have not been complied with by Mr. Gurney: the deed may prove a nullity. Regular

Sequestration of a Living decreed at the instance of creditors of the incumbent, who did not appear to a monition to shew cause.

1842.
Nov. 10.
PER CUM.

JAN. 18. notice ought to be given to Mr. Gurney of this motion, and
 Abbitt. Gurney. he ought to have an opportunity of contesting it." On the
 Nov. 29. third session of the same Term, *Dr. Bayford* renewed the
 PER CUR. motion, on an affidavit of the facts before detailed, and of
 notice having been given to Mr. Gurney; but THE COURT
 said: "I am of opinion that all I can do is to decree a
 Monition, calling upon Mr. Gurney to shew cause why a
 sequestration should not issue. I have considered the case,
 and my reasons for not going further are these:—If there
 should be any doubt as to the validity of the sequestration,
 when an attempt is made to act upon it, the mischief may
 be serious, and no clergyman ought to be deprived of his
 Living without a regular and formal notice, and no notice
 not of a judicial character can bind him. I therefore decree
 a Monition to shew cause why the sequestration should not
 issue.

1843.
 Jan. 18.
 MOTION.

JUDGMENT.

The Decree was extracted and returned on the By Day,
 and no appearance having been given, *Bayford, D.*, re-
 peated his motion for a Decree of Sequestration.

DR. LUSHINGTON.—I have considered the case—it is not
 free from difficulty at all; but the incumbent not having
 thought fit to appear, I think, under the circumstances, I
 am bound to decree a sequestration. Perhaps some objec-
 tion might be raised, considering the length of time that has
 elapsed, and that the parties, instead of resorting to 'the
 ordinary process of the law, have had a deed of arrange-
 ment amongst themselves. But, after serious consideration,
 I think I ought to accede to the application, for these rea-
 sons:—By refusing it, I should drive the parties to a Court
 of Law, or to the Insolvent Debtors' Court, whence consi-
 derable expense would arise, with the same ultimate result.
 Looking at the distressed state of Mr. Gurney, and that he
 has had regular notice of this application and has not ap-
 peared, I think it will be best for the interests of all parties
 that I should decree the sequestration.

Sequestration
 decreed.

Smale, Proctor.

Archers Court of Canterbury.

JANUARY 20.

CLOWES v. CLOWES.—*Allegation.*—This was originally a suit of nullity of marriage by reason of fraud in obtaining the licence, by Mr. Edward Clowes against Harriet his wife, in which the Libel was rejected by the Court on the first day of last Term.* The costs were not taxed till the first session of the present Term. Upon the By Day in the last Term, the wife's Proctor asserted an Allegation (termed a "Libel"), for the purpose of obtaining a sentence of restitution of conjugal rights. The husband's Proctor prayed to be heard on his petition against the bringing in of such Plea; but he afterwards abandoned the prayer, and declined to appear in the cause, and the party himself not appearing, the Libel was brought in, and stood for admission.

In a suit of nullity of marriage, on the rejection of the husband's libel, the wife (the party proceeded against) allowed to bring in an Allegation for restitution of conjugal rights, without citing the husband, he being, by his Proctor, before the Court.

Previous to the argument, the Proctor for the wife acknowledged the receipt of the costs.

Addams, D., for the wife, moved the admission of the Libel. Jan. 11.
ARGUMENT.

PER CURIAM.—The difficulty I have is this, that, by the Letters of Request, I am to hear a suit of nullity of marriage, which original suit is at an end by the rejection of the Libel, except as to taxation of costs.

Addams, D. —With submission, there is no difficulty. The parties are before the Court, and although the suit has changed its original complexion, there is no necessity for a fresh citation. It has been decided over and over again, that a party proceeded against may libel the other party in a suit for adultery or cruelty, as the case may be, without a fresh citation. The party proceeding in the original suit has pleaded a *factum* of marriage, but he alleged that the marriage so had was invalid; the Court, by rejecting his Libel, has in effect determined that, *primâ facie*, the parties are validly married. The parties are in these circumstances sufficiently before the Court to enable it at once to assign the husband to take

* *Ante*, p. 1.

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Clowes v. Clowes.

PER CURIAM.

his wife home and treat her with conjugal affection, instead of a suit being instituted for restitution. But there are precedents in the way, and therefore I am not in a condition to make that prayer. It is open to the wife, it is true, to cite Mr. Clowes in a suit for restitution; but could she find him? He is now before the Court by his Proctor. In the case of *Sheridan v. Sheridan*,* in the Consistory Court of London, a suit by the wife against the husband for adultery, after the wife had abandoned the suit, her Proctor making no prayer, though there was an outstanding cause in the book, she took out a Citation against her husband in a cause of restitution; the husband appeared under protest, and Dr. Lushington held that the protest was good, and dismissed the husband, because there was an outstanding cause of divorce by reason of adultery against the husband, and whilst this was the case, it was not competent to the wife to sue him for restitution. So here it might be said, the party is already before the Court. In *Wescombe v. Dods*,† 1752, a cause of jactitation of marriage, in the Consistory Court of London, the wife gave in an Allegation for restitution of conjugal rights. [PER CURIAM. Here, the Libel was rejected, and the consequence would be, that the party cited would have been dismissed—that is the necessary consequence of the rejection of the Libel, in a suit of nullity of marriage. She then intervenes in another suit. One difficulty is removed by the Proctor for the wife having acknowledged the receipt of the costs, which is a peremption of appeal by the husband. The admission of an Allegation by the wife, after rejection of the Libel, in a suit of jactitation, would be a precedent.] In *Best v. Best*,‡ a great deal of pains was taken by Dr. Swabey. It had been held that a fresh Citation was necessary in the same suit; but he referred to several decisions by which that doctrine was overruled.

Jenner, D., on the same side. In *Hawke v. Corri*,§ Lord Stowell, speaking of the defences to a charge of jactitation, says, that a valid marriage may be alleged; and “in that state of things, the proceeding assumes another shape, that

* In 1840; not rep.

† 1 Add. 411.

‡ 1 Lee, 59.

§ 2 Hagg. C. R. 280.

of a suit of nullity, and of restitution of conjugal rights, on an inquiry into the fact and validity of such asserted marriage, and it will depend upon the result of that inquiry whether the party has falsely pretended, or truly asserted, such marriage: in the former case, the Court could pronounce a sentence of nullity, and enjoin silence in future; in the latter, the Court would enjoin the accuser to return to matrimonial cohabitation, unless it could be shewn that some other reason was interposed to dissolve that obligation." [PER CURIAM. You entitle this a "Libel," as if it were the first plea in the cause.] It is called "Libel or Plea." The Libel in the suit is rejected; this, then, is the Libel. The present case is much stronger than *Hawke v. Corri*; the husband pleaded the same marriage we plead now, and the same facts. In *D'Aguilar v. D'Aguilar*,* there was no plea by the husband, and Lord Stowell said he should be bound to enjoin the wife to return to cohabitation without any plea by the husband: "I think this lady was in that state of oppression which fully justified the step she took in withdrawing from her husband. That is the point I have to determine; for, if she was not justified, I must pronounce her under an obligation to return." [PER CURIAM. Lord Stowell could never have laid it down, that in a suit by the wife for adultery, if she failed, he would be bound to decree the wife to return home.] The report says so. It would be hard for the wife in this case to be put to trouble and difficulty in citing her husband in a suit for restitution, and the husband would incur the expense of two suits. In *Sheridan v. Sheridan*, it was sufficient for the husband to allege, in bar, that a suit was depending against him.

PER CURIAM.—I am not prepared to admit this Libel or Allegation at the present moment; I feel a difficulty with regard to it. If it had not been for the costs having been paid, I should doubt whether the Court could have proceeded. I am not aware of any case of a suit for restitution of conjugal rights being engrafted on a suit of nullity of marriage.

* 1 Hagg. E. R. 765.

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PER CURIAM.

PER CURIAM.

Cur. adv. vult.

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JUDGMENT.

SIR H. JENNER FUST.—I have not been able to find any case precisely in point, and I heard no such case cited. But *Wescombe v. Dods*, according to a note given to me by the learned Counsel for Mrs. Clowes, seemed to be so near as to be precisely in point in principle. That was a suit for jactitation of marriage, in which it was stated that the wife pleaded the marriage, and obtained a sentence in favour of that marriage, and consequently was dismissed from the suit of jactitation; and it was stated by Lord Stowell, in *Hawke v. Hawke*, that it was competent to a party proceeded against in a suit of jactitation, to plead the fact of a valid marriage to justify the jactitation, and to obtain a sentence enjoining the accuser to return to matrimonial cohabitation; and there can be no reason whatever, as it appears to me, upon consideration, why, in a cause of nullity of marriage, the same course should not be pursued. If in *Wescombe v. Dods* I had been able to find that there had been a decree upon the husband to take his wife home, and to treat her with conjugal affection, the Court would have considered that it approached so nearly in point of principle as to have induced it to give similar directions in this case. But in the case of *Wescombe v. Dods*, as given in Sir George Lee's Reports, it does not appear that there was a Monition to the husband to receive his wife home and treat her with conjugal affection. That was an appeal from a sentence of Dr. Simpson, the Chancellor of London, and Sir George Lee's note is: "The Chancellor of London was of opinion Dods ought to be admitted to her suppletory oath, as prayed by her, and she, being present in Court, immediately took the oath, and swore to her marriage with Wescombe; whereupon the Court pronounced for the validity of the marriage between Wescombe and Dods, and gave sentence accordingly. Wescombe appealed from this sentence to the Arches, where the cause was heard upon the same evidence, when I ordered the suppletory oath to be read as part of the proofs, and confirmed the sentence given by the Chancellor of London, pronouncing for the marriage." There it stops, and therefore it is not precisely in point to the present case.

Now we know that, in certain proceedings in these Courts, it is competent to a wife to plead a marriage, and obtain a sentence of divorce, where there has been a suit for the restitution of conjugal rights. Several cases of that kind have occurred, where the wife has pleaded such marriage, and obtained a sentence in favour of that marriage. There have been many cases in which these Courts have received a Plea, in a suit for the restitution of conjugal rights, of cruelty and adultery. These have been pleaded where the wife had pleaded the marriage, and having established the fact of adultery, the sentence has been for a divorce, though the suit was originally for the restitution of conjugal rights; and these coming by Letters of Request. Therefore, if it was competent to the Commissary of Surrey to have received an Allegation similar to that presented in this Court, it is equally competent to this Court, because it receives a cause with all its incidents and emergencies, as in the Court. If the husband's Libel had been admitted, it would have been competent to the wife to plead a good marriage, and to obtain a sentence in her favour; and she would have been entitled to a decree against her husband, to receive her home, and to treat her with conjugal affection. It was for some time considered that, in cases of this description, it was necessary,—where cruelty and adultery were pleaded in bar of a suit for restitution of conjugal rights, that there should be a cross-citation; and from the history given of the practice of the Court by Dr. Swabey, Chancellor of the Diocese of Rochester, in the case of *Best v. Best*, it appeared to have been the opinion of the practitioners generally, and of the counsel there mentioned, that there could be no sentence of divorce for cruelty or adultery, in a suit for the restitution of conjugal rights, without a cross or separate citation. But in *Sir George Savile's* case, it was decided that a cross-citation was not necessary. Some doubts were, however, considered to exist, for in the case of *Matthew v. Matthew*, 1769, which is cited in *Best v. Best*, the question was mooted again, before Dr. Bettesworth (the Judge), in the Consistory Court of London. The husband pleaded the wife in a cause of restitution. The wife, in answer

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to the Libel, alleged the adultery of the husband, and prayed a Citation in a cause of divorce on that ground. The Judge decreed the Citation, "observing, however, that the adultery might be pleaded, and that being proved, a divorce might be had just as well without it." Dr. Swabey says: "That a cross suit, or separate citation, is necessary, however, under such circumstances, has never been asserted, that I am aware of, from that time to the present, and the practice of either, thus held to be optional, appears from that time to have been finally dispensed with." Since the case of *Best v. Best*, no doubt has been entertained that a party might plead not only in bar to a suit for the restitution of conjugal rights, cruelty and adultery, but might obtain a sentence on that ground. Therefore, it is not necessary that there should be a cross-citation,—the party being before the Court,—in order to obtain a sentence.

The cases do
 not go the
 length of the
 present.

But still these cases do not go the length of the present, in which a Libel is given in a suit for the restitution of conjugal rights, founded upon a cause of nullity, where the Libel in that cause had not been admitted. In *D'Aguilar v. D'Aguilar*, Lord Stowell thought he should pronounce the wife, the party proceeding, under an obligation to return to her husband, if the facts did not justify her in withdrawing from him, it being a suit by the wife against her husband for a separation by reason of cruelty and adultery, in which Lord Stowell held both to be proved. So that Lord Stowell was of opinion that, in a suit for separation by the wife, if she failed to obtain a sentence, he might order her to return to her husband. This opinion of Lord Stowell, when mentioned to the Court in argument, did not appear to be consistent with other cases decided by him, though it did not occur to me at the time what those cases were; but, looking into the case of *Evans v. Evans*,* which was a suit for divorce by reason of cruelty by the wife against the husband, I find Lord Stowell says: "It is a mistake to say, as it has been said on this occasion, that, in the present suit, I can issue a Monition to either party to return: this suit can

* 1 Hagg. 120.

lead to no such sentence." This seems to contradict his opinion in *D'Aguilar v. D'Aguilar*. JAN. 20.

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The Court, in its search for old cases, has found several which have a considerable bearing upon the present. In *Moore v. Moore*,* which was a suit for separation by reason of cruelty by the wife against the husband, in the Court at York, sentence went against the wife; she appealed to the Delegates, who affirmed the sentence, and the cause was remitted. At the prayer of the husband, a Monition issued from the Court at York, for the wife to return to cohabitation. She refused to obey, and was pronounced excommunicate. It appears that, afterwards, the wife appeared, and alleged that the husband was a Roman Catholic convert, and not entitled to be heard. Much turned upon the question whether a Roman Catholic could be heard, and it was determined by the Court at York, that, though he could not be heard in an original suit, he might be heard in defence, and on appeal to the Delegates, they were unanimously of opinion, that this was not an original cause, but a consequence of the sentence, and a Monition was decreed against the wife to return to cohabitation. This case does not go the entire length of the present, but only to this extent: that, in a suit for cruelty, where the wife or husband fails, the Court, as a consequence of the sentence, may order the party to return to cohabitation.

Another case is that of *Smith v. Smith*.†—I mention this case, though the Court came to no determination upon it. It was a cause of jactitation by the husband against the wife, which went to the Delegates. The wife proved the marriage, and a Monition issued to the husband to take her home. It was said that the judges were *functi officio*, whilst the other side contended that the cause with all its incidents and emergencies was referred to the Delegates. The suit was not proceeded in, so that the Court came to no determination; but it seems, as far as it goes, to affirm the principle, that, if a judge be not *functus officio*, a party may be monished to return to cohabitation in a suit for jactitation.

* February, 1723: from a note of Dr. Andrews.

† Easter Term, 1718.

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There are some other cases which do not come, perhaps, precisely to the same point; but there is the case of *Borton v. Borton*,* which was a suit for separation by reason of cruelty, by the wife, who failed in her proof, and the husband was ordered to attend to undergo monition to take his wife home and treat her kindly: he had offered to do so in the first instance. This case seems to affirm the same position; namely, that, in a suit for cruelty, in which the wife fails, the husband may be required to attend, to receive a monition to take his wife home and treat her kindly.

Distinction
 where issue
 joined and facts
 disputed.

There is a distinction in respect to cases where issue had been joined, and where the facts are disputed. In the present case, the husband denies that the marriage is a valid marriage; he sues in a cause of nullity of marriage; and the question is, whether this is so material a distinction as to induce the Court to depart from the practice. I am of opinion that this is not a material distinction. It is clear that the husband might have been at liberty to plead that this is an invalid marriage, and if he had done so, it is clear that the wife must have had a sentence in favour of the marriage, and therefore, within the principle of the cases I have mentioned, she would be entitled to a Monition for a return to cohabitation. The husband is before the Court by his Proctor, in a matrimonial cause, and the wife, in that particular cause, would be at liberty to prove the marriage, and obtain a sentence in favour of the marriage, and as a consequence of such sentence, she would be entitled to a Monition (the husband being before the Court) for a return to cohabitation.

Libel ad-
 mitted.

Under these circumstances, I think that this Libel, or Allegation in the shape of a Libel, for restitution of conjugal rights,—the nature of the suit being changed,—is proper to be admitted. It is not strictly a proceeding *in pœnam*; let the party be called, and also his Proctor.

Proctors:—*G. Fielder*, for the husband; *Fox*, for the wife.

FEB. 9.

(Further proceedings took place in consequence of the absence of the husband abroad, and the want of a sufficient proxy from him, the Proctor being authorized to act only in a suit of nullity.)

* Notes of Sir E. SIMONSON.

WILLIAMS V. GEORGE AND NUNN.—*Appeal.—Act on Petition.*—This was an appeal from the Consistorial and Episcopal Court of St. Davids, in a suit for subtraction of church-rate, and was chiefly remarkable for the irregularities and anomalies of the proceedings in the Court below. It appeared from the process, that, in 1835, the parish church of Minwere, in the county of Pembroke, being in a dilapidated state, it was resolved at a vestry meeting of the churchwardens and parishioners to pull it down and build a new one, and a rate of 5s. in the pound on the annual value of all rateable property in the parish was made, under the provisions of the Act 59 Geo. 3, c. 134, secs. 25 and 40, for and towards the pulling down of the parish church, it being in a ruinous and dilapidated state, and for and towards building a new church in lieu thereof. At this time, James Nunn and John Thomas were the churchwardens. Some of the parishioners refused to pay, and amongst them Mr. John Moy, who was assessed in the sum of £81. 17s. 6d. He died in February, 1837, prior to which time no steps had been taken to recover the rate from him. His acting executor, Mr. John Williams, proved his will in the Diocesan Court in September, 1837. In 1839, William George became a churchwarden, and was re-appointed to the office in 1840, in which year he signed a proxy, in conjunction with Mr. Nunn, the other churchwarden, to institute proceedings in the Court of St. Davids against Mr. Williams, as executor of Mr. Moy, to recover the rate due from the latter; but it was not till March, 1841, that Mr. Williams was served with a Citation. In the year 1841, Mr. George ceased to be churchwarden, and in April of that year, he sent to the Proctor employed in the cause a notice to this effect: "Take notice, that John Thomas is made churchwarden in my stead, and you are requested to get his name put instead of mine." The Libel was given in, in the Court of St. Davids; upon its admission, the Proctor for Mr. Williams protested against further proceedings, on the ground of the Court's want of jurisdiction, the rate sued for being for a larger sum than the law authorizes to be levied in one year; nevertheless, by common consent, the cause was heard by the Judge on *viâ*

JAN. 20.

Church-rate. Application to remedy the errors and irregularities in the original proceedings in a Diocesan Court, in a suit to recover a rate from the executor of a deceased ratepayer, on appeal—refused.—A rate, sustained in the Court below, pronounced against.—Whether an executor can be sued for a rate due from his testator.

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 ———
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voce evidence, four witnesses being produced before the Judge in support of the Libel, three of whom were examined, and cross-examined by the Proctor for the party cited, who, though he gave no Allegation, produced two witnesses, who were likewise examined *vidæ voce* on his behalf, and cross-examined in the same manner on behalf of the churchwardens. On the 14th October, the Judge (the Rev. David A. Williams) pronounced that the Libel was fully proved, and condemned Mr. Williams (the Appellant) in the rate and the costs. From this sentence he appealed to this Court. The proceedings in the Court below had been carried on in the names of Messrs. George and Nunn, as the churchwardens, notwithstanding the notice sent by the former; but, on the cause being appealed, Mr. George refused to appear in this Court, and was pronounced in contempt for non-appearance, and a writ *de contumace capiendo* was taken out against him, when he purged his contempt by appearing, though by a separate Proctor, and gave a negative issue to the Libel of Appeal, praying to be dismissed. When the process was transmitted to this Court, in consequence of the mode in which the witnesses had been examined, it was unaccompanied by any evidence (save the exhibits), and the Court was moved to allow witnesses to be examined in this Court on the Libel in the Court below, which application was refused, and an Act or Petition was now entered into, in which the Respondent Nunn (his co-respondent not joining) prayed the Court, previous to hearing the appeal, to suffer witnesses to be examined, in the usual form of written depositions, in this Court.

ARGUMENT.

Addams, D., for the Respondent Nunn. The stringent objections to the rate appear to be these: first, that it is not shewn that the consents of the Ordinary, or of the Patron, Incumbent, or Lay Impropiator, of the living, have been obtained to the removal of the old church, as required by the Act; secondly, that the Act provides that no more than one shilling in the pound shall be raised by rate in any one year, and no more than 5s. in the whole. If the first objection be relied upon, it should have been put in plea. The latter objection is founded upon a misapprehension of the meaning of the Act: "not exceeding the amount of one

billings in the pound in any one year, or the amount of five billings in the pound in the whole," must mean that, if the whole sum do not exceed 5*s.* in the pound, it may be raised in one year; but if the whole sum shall exceed 5*s.* in the pound, it shall not be raised in one year, but by instalments of 1*s.* in each year. The Appellant should have appealed on the admission of the Libel, instead of which, he suffers the case to go on, and be heard in the regular way. [PER CURIAM.—Not very regular.] He cross-examined witnesses, and takes his chance of a sentence in his favour.

R. Phillimore, D., for the Respondent George. The party whom I appear revoked his proxy before sentence, and had nothing to do with the cause in the Court below. [PER CURIAM.—Did the new churchwarden give authority for the substitution of his name?] The notice was regularly served on the Proctor, who, nevertheless, continued the suit in the joint names. Another ground of his defence is, that, in 1841, he ceased to be churchwarden and inhabitant.

Robinson, D., for the Appellant. If the process in the present case afford a fair specimen of the proceedings in the Diocesan Courts in the Provinces, the public will rejoice when the Legislature shall carry into effect the projected abolition of the local jurisdictions. All these extraordinary proceedings evince a complete disregard of the course of practice in these Courts, especially in the mode in which the evidence was taken in the Court below. Mr. George alleges that he had revoked his proxy and ceased to be a churchwarden before sentence was given. But the proceedings were in the names of the two churchwardens, and no step was taken in open Court to retract his proxy and withdraw from the suit; and with regard to his ceasing to be churchwarden, a suit commenced by him before can be carried on after the expiration of his year of office. The prayer for the examination of witnesses in writing cannot be acceded to. The whole proceedings are erroneous and defective. Secret examination of witnesses is declared by Lord Stowell to be the rule of practice in these Courts. *Herbert v. Herbert*.*

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* 2 Hagg. 267.

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Oughton lays down the same rule. Lord Hardwicke, in *Graves v. Budget*,* says that such is also the constant course of practice in the Court of Chancery, and that "the course of the Court is the law of the Court." But on the face of the Libel no evidence could make this a valid rate. It is invalid, first, for want of the consent required by the Act to the removal of the old church, which is a condition precedent, and the Court has always required proof of this fact. *Blunt v. Harwood*.† It is bad, secondly, because the Act provides that no more than a shilling rate shall, in such cases, be levied in one year, for the relief of the parish, for that is the true construction of the 25th sec. Then I submit that the repair of the parish church is an obligation *in personam*; it has been so laid down in express terms recently in the Consistory Court of London. *Veley v. Gosling*.‡ The non-payment of church-rate is, therefore, a personal tort, a misfeasance in a personal obligation, and *actio personalis moritur cum persona*. An executor is consequently not liable for church-rate unpaid by his testator. *Williams, Law of Executors*.§

Jenner, D., on the same side. The amount sued for is £61. 17s. 6d. in one rate, being one-fourth of the testator's annual property. It was not sued for till six years after it was made, and four years after the death of the party from whom it is claimed.

JUDGMENT.

SIR H. JENNER FUST.—The proceedings in this case do not offer a very favourable specimen of the correctness of the forms adopted in the Court from whence the appeal comes; I never saw, in any preceding case, so many and such great irregularities as in the present.

The rate sued for is £61. 17s. 6d., for one rate only, not extending over several years, and it does certainly appear to be a very large sum to be sued for as an ordinary rate for the repairs of the parish church. But on the face of the rate, it seems that it was made not for the repair, but for the pulling down and rebuilding, of the church, under and by virtue of the Act 59 Geo. 3, c. 134. The sum, therefore,

* 1 Atk. 411.

† 1 Curt. 648.

‡ 1 Notes of Ca. 479.

§ 2 Vol. b. 2. c. 1. s. 1. 1230.

ough large as a contribution for repairs, is not too large as contribution for removing and rebuilding the church.

It is alleged by the Appellant, that the proceedings in the Court below are erroneous from the beginning to the end, and that although the Court, as a Court of Appeal, is able and must be anxious to correct the proceedings in the Diocesan Courts, in order to prevent a failure of justice; yet, where the proceedings have been so completely erroneous, and the irregularities go to the very root of the matter, this Court is not entitled, or at least would not be inclined, to grant any indulgence to parties so situated. If the taking of evidence *vidæ voce* had been the only irregularity, the Court would have been inclined to correct that error, and in order that the ends of justice might not be defeated, would have permitted witnesses to be examined in this Court in support of the Libel. But it is necessary to consider what is stated on the other side, that is, on behalf of Mr. Williams, the executor, who is the party proceeded against, and not the rate-payer himself.

It seems, from his reply to the Act, that his Proctor was present in the Court below, and made no objection to *vidæ voce* evidence; therefore the irregularity is not with the churchwardens alone, as the other party concurred by his proctor. He alleges that it is not competent to the Court to correct the nullity of the evidence; that the Citation issued against both executors of Moy, but against himself, as the executor; that it does not appear that, at the time the rate was made, or since, any licence or faculty was obtained for pulling down the church, or any consent from the ordinary, Incumbent, or Patron; that his testator lived till 1837, and no proceedings had been taken against him to enforce the rate; that the will was proved in that year in the Court of St. David's, yet no proceedings were commenced against him till four years after, the Citation being the first intimation he had of the claim for the rate; that he has no assets or effects of Moy in his possession or under his control; that many of the parishioners had also refused payment of the rate, the gross amount of which was £250, and

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Error in
taking the evi-
dence might be
corrected.

The Appel-
lant a party
to the irregu-
larity.

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Not a case
for special in-
dulgence.

In regard to the first question, the circumstances are such as, in my opinion, to make this not a case for special indulgence from the Court, by permitting witnesses to be examined upon the Libel, or to induce this Court to be a party to the irregularities in the Court below. The proceedings are against Mr. Williams, as executor of Mr. Moy, deceased, and I should be glad to have it explained to me, why the churchwardens in this parish have been so lax in the collection of the rate ; why only £50 or £60 should have been collected of a rate which ought to have produced nearly £250 ; and why the only proceedings, after so long a lapse of time, should have been commenced against the executor of a party. Can parties guilty of such *laches* be entitled to any indulgence ? Certainly not ; there was ample time to have recovered the rate from the party himself. There is no ground, therefore, laid for the special indulgence of the Court.

Repairs of
church a per-
sonal obliga-
tion.

But I look at the facts of the case, and I find that an executor is called upon to pay a rate assessed upon his testator. It has been held by the learned Chancellor of London, that the repair of the parish church is a personal obligation, and church-rate is a personal claim upon the party assessed. I should like to have it shewn to me that an executor is liable in any shape whatever for a church-rate due from his testator ; and if he is liable, if it is a debt, how such debt can be recovered in these Courts : if it be a debt, it is recoverable in another Court. Moy may have been liable for this rate, and proceedings might have been had against him in the Ecclesiastical Court, and if they had, and he had died in the meantime, the suit would have immediately abated, and his executors would not have been called upon to pay the rate. This Court has no jurisdiction in actions for debt, and I have not heard of any case in which an executor has been sued for a church-rate due from his testator in the Ecclesiastical Court.

There is another objection ; the executor alleges that he

has no assets ; there is a plea of *plenè administravit*. Therefore, the Court could not be induced to grant the claim for special indulgence in this case, for the examination of witnesses, on the ground that it would effect the ends of justice ; it appears to me that it would be the reverse, unless I were to hold that Mr. Williams is bound to pay this claim upon his testator out of his own pocket.

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Then it is objected to the rate, that the proper consents to the removal and rebuilding of the church have not been obtained, as required by the Act of Parliament, and on the face of the proceedings not a single syllable is said as to such consents having been obtained. Due and regular notice is pleaded, but I cannot say whether or not such notice was proved by *vidæ voce* evidence. In the case of *Blunt v. Harwood*, the proper consents were pleaded ; and in another case, I recollect, where no consents were pleaded, the Libel was reformed by pleading that there had been consents.

Proper consents not obtained.

Another question raised is as to the amount of the rate, 5s. in the pound, whether, under the true construction of the Act, more can be raised in any one year than 1s. in the pound. The Court is not bound to go in this particular case into this question ; the parties must shew that the requisites of the Act have been complied with.

Amount of the rate.

It is said, that the plea might be amended, and additional Articles brought in ; but this is a case in which the Court is not inclined to give such indulgence to the parties as to allow them to bring in additional Articles, owing to their delay and *laches*, nor does it appear that they would be entitled to recover the rate from an executor.

Amendment of Libel.

Looking, therefore, at the delay in suing for this rate ; to the party who is proceeded against, and to the manner in which the suit has been conducted in the Court below ; and considering that it would not further the ends of justice to comply with the prayer of the party for the examination of witnesses, I reject the petition.

Petition rejected.

Respecting the costs, I reserve that question till the final hearing of the principal cause, and I direct it to be proceeded with according to the tenor of former acts.

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George.*

Cause.—The Counsel for the Respondents joined in requesting the Court to dispose of the principal matter at once ; and, with the consent of all parties, the cause was concluded, and assigned for sentence.

JUDGMENT.

For the ap-
peal.Rate pro-
nounced a-
gainst.
Costs.

SIR H. JENNER FUST.—I am of opinion that the sentence in the Court below cannot be sustained. I pronounce for the appeal, I reverse the sentence appealed from, I retain the principal cause, and, on the same day, I pronounce against the rate, and dismiss the party who has been sued for payment of the rate, with his costs of appeal. I do not give him his costs in the Court below, as he lost his way, by giving in a protest and not extending it, and because he was a party consenting to the irregularity in taking *vide nec* evidence. Each party will, therefore, pay his own costs in the Court below.

Proctors :—*For*, for the Appellant ; *Toker*, for the Respondent George ; *Cox*, for the Respondent Nunn.

High Court of Admiralty.

JANUARY 24.

Collision —
Construction
and application
of the Trinity
House rules.—
What are ex-
ceptions.

THE " FRIENDS."—*Act on Petition.*—This was an action by the owners of the steam-ship *Menai*, belonging to the General Steam Navigation Company, to recover from the owners of the schooner *Friends* the amount of damage occasioned by a collision between the vessels about seven o'clock in the evening of the 27th of October last, in the River Thames, between Barking Reach and Halfway Reach. The steam-vessel was coming up the river from Ostend, with passengers, the wind and tide against her ; the schooner was proceeding down the river, under a press of sail, to take in ballast at Erith. In this case, almost every fact, even the direction of the wind, the character of the night, and the very locality of the collision, was matter of dispute.

ts material to the question are stated in the Judge-
the question turned upon the construction and appli-
f the rules promulgated by the Trinity Board, for
igation of steam-vessels.*

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Court was assisted by Trinity Masters.†

ms, D., for the *Menai*. I have no objection to urge
the Trinity House regulation ; if properly observed,
and to prevent collisions ; but if it is to be under-
an unvarying rule, applicable to all cases, whether
a reasonable risk of collision or not, then the regu-
a nuisance. The question is, whether the rule was

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ARGUMENT.

avigation of steam-vessels. — Trinity House, London, 30th
1840. — The attention of this corporation having been directed
merous severe, and in some instances fatal, accidents which
sited from the collision of vessels navigated by steam ; and it
; to be indispensably necessary, in order to guard against the
of similar calamities, that a regulation should be established
aidance and government of persons entrusted with the charge
essels ; and whereas the recognized rule for sailing vessels is,
having the wind fair shall give way to those on a wind : — That
h are going by the wind, the vessel on the starboard tack shall
wind, and the one on the larboard tack bear up, — thereby pass-
another on the larboard hand : — That when both vessels have the
e, or a-beam, and meet, they shall pass each other in the same
e larboard hand ; to effect which two last-mentioned objects,
must be put to port : — And as steam vessels may be considered
ht of vessels navigating with a fair wind, and should give way
vessels on a wind on either tack, it becomes only necessary to
rule for their observance when meeting other steamers or sail-
s going large. Under these circumstances, and with the object
ted, this Board has deemed it right to frame and promulgate
ing rule, which, on communication with the Lords Commis-
f the Admiralty, the Elder Brethren find has been already
n respect of steam-vessels in Her Majesty's service, and they
nestly to impress upon the minds of all persons having charge
vessels, the propriety and urgent necessity of a strict adherence
ix. — *Rule* : When steam-vessels on different courses must un-
or necessarily cross so near that, by continuing their respective
here would be a risk of coming in collision, each vessel shall
elm to port, so as always to pass on the larboard side of each
A steam-vessel passing another in a narrow channel must
ave the vessel she is passing on the larboard hand."
ain Hayman and Captain Weller.

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The Friends.

applicable here. We state that, on observing the schooner, the helm of the steam-ship was put to starboard, on the supposition that the schooner would keep the mid-channel, which was her course to run down with the tide; but it being apparent that the schooner, with a press of sail, was bearing down on the steamer, the helm of the latter was kept to starboard, coming as near the shore as possible, to avoid the collision, the pilot calling to the schooner to put her helm up, and this not being complied with, the engines were stopped, and we were then so near the shore that the vessel actually touched the ground. Is it to be suggested, that, where there was no chance of collision,—supposing the steamer hugged the Southern shore, and the schooner was running down the mid-channel,—by the Trinity House regulation, the steamer was to port her helm? This would be to lead to confusion, and increase the risk of collisions.

Robinson, D., on the same side.

Sir John Dodson, Q. A., for the *Friends*.—The propriety of the rule is not denied, if it be fairly applied; but it is said not to be applicable in this case. The rule is, that where two steam-vessels, on different courses, or when a steam-vessel and a sailing vessel with the wind large, as in this case, must necessarily cross so near that there is risk of collision, “each vessel shall put her helm to port, so as always to pass on the larboard side of each other.” Where there is a reasonable risk of collision, in such cases, this rule is to prevent it; so that the question is, was there such reasonable risk in this case? If so, it is clear that we did right in porting our helm in order to pass to the larboard of the *Menai*, and the *Menai* did wrong in putting her helm to starboard, in consequence of which the two vessels came in collision. The case of the “*Duke of Sussex*”^{*} is on all fours with this, and the judgment of the Court in that case will apply to the present. According to their own statement, there was a chance of collision, and yet they put their helm to starboard.

Haggard, D., on the same side.

^{*} 1 Notes of Ca. 166.

LUSHINGTON.—(*To the Trinity Masters.*)—Gentlemen, the amount of damage sued for in this case is not very great; but it appears to me that the arguments which have been advanced in the course of this discussion are of very considerable importance with regard to the navigation of the river Thames in future. It is necessary, in the first instance, that I should briefly state those facts which I think are of importance, in order to state the principle involved in this case, and in my judgment there is not the slightest necessity to enter into any of controverted fact between the parties, because the ultimate decision to which you may come, according to my conception, whichever be the truth, it will make no difference as to that decision.

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SUMMING UP.

statement made on behalf of the owners of the *Menai* has the following effect: though I ought previously to state, in the *Menai* cannot recover for the damages sustained in consequence of this collision, unless it be proved that the measures adopted were the proper ones to be taken according to the true rules of seamanship. And I should also observe, that it is possible, in some cases, that both vessels may be to blame; but in the present case it appears to me (subject to your better judgment), that the only question is whether the *Menai* pursued those measures which she ought to have done upon descrying the schooner, the *Friends*. My own statement is, that she was coming up the river, at that time on the Kentish side, distant about one-third of the way, the night being dark and the ebb-tide then running, the wind blowing strong from the west, when she perceived a vessel coming down the river, just open on the starboard bow; that as soon as this vessel was reported, the helm of the steam-ship was put to starboard, under the full impression that the schooner would keep the mid-channel, and not go down with the tide, and which was her proper course. Now, in my judgment, the true question will be—whether or not, under these circumstances, the steam-ship did right or wrong in starboarding her helm, and I do not think that that question is in any degree affected by reference to the circumstances which are stated on behalf

Case of the
Menai.

Differences,

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of the *Friends*. In fact, the only points of difference are these—First, as to the locality, there is a slight degree of difference, which may, by possibility, constitute a distinction in your minds as nautical men. There is also a difference with respect to the wind; but it appears to be a slight one; for the evidence on behalf of the *Menai* is, that it was from the W.; and on the part of the *Friends* that it was from W. and by S. The only other point which can be said to be one of controversy between them is, as to how the steamer was descried when she was first perceived. It is stated in these words: "That the lights were discovered in Halfway Reach, and from their position, shewed that the steamer's head was inclined to the N."—which undoubtedly it was; "that, as the steamer rounded the point above Halfway House, she opened upon the schooner's larboard bow." Now, that may possibly constitute some difference in point of fact, but difference in point of reasoning, is leading us to a different conclusion, in my judgment, it does not; because I am clearly of opinion that these two vessels were so far approaching each other in a direct line that it was necessary for them to take proper measures to avoid a collision, whatever those measures might be.

unimportant.

The Rules.

Now let us consider, in the first instance, whether or not the rules promulgated by the Trinity Board for the guidance of vessels do or do not apply to the present case; and, for the purpose of trying that point with perfect justice to the *Menai*, I will assume that the wind at the time did blow precisely as it is stated by her—namely, from the W. and not W. by S. Let us consider what are the rules which you have promulgated, and to what are they applicable; whether there are any, and what, exceptions; and finally, whether the circumstances of this case do constitute an exception or not.

Their construction.

In the first place, if these two vessels were sailing so wide of each other that there was no probability of collision, the rule has nothing whatever to do with the case—it is not applicable, either by its terms, or by any rational rule of construction; I repeat, therefore, the observations I made in the case

e "*Duke of Sussex*"—that no rational man can construe this rule to mean, that when two vessels are approaching each other, not in a straight line or any thing like a right line, and when there is no danger of collision there— they are to alter their courses merely for the sake of giving a rule which is applicable only to a different state of things.

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The real substance of this document (the Trinity House regulations) is, first, to state certain recognized rules—not to enact them as rules, but to state them as rules which have prevailed; secondly, without establishing any rule, it states what ought to be considered the power and condition of steam-vessels; and it then purports to provide for the wrong case:—"It becomes only necessary to provide a rule for their observance when meeting other steamers or sailing vessels going large." Whether, in point of fact, the Admiralty has or has not actually provided directly for all contingencies may be questioned. But I will go on—"Whereas the recognized rule for sailing vessels is, that those having the wind fair shall give way to those on a wind; that when two are going by the wind, the vessel on the starboard shall keep her wind, and the one on the larboard tack up—thereby passing each other on the larboard hand," is a statement recognizing it as an established custom: that when both vessels have the wind large or a-beam, and meet, they shall pass each other in the same way on the starboard hand;—to effect which two last-mentioned objects, the helm must be put to port." Now mark: this is the case of two vessels both having the wind large or a-beam. Now if it had not been a steam-vessel, it is clear that, taking the wind to be either from the W. or the S.W., the schooner would have the wind free, and if the *Menai* had been a sailing-vessel, she would have had the wind large. But the *Menai* was a steamer, and we are to consider her according to our statement in the following paragraph:—"And as steam-vessels may be considered in the light of vessels navigating with a fair wind, and should give way to sailing vessels on a wind on either tack, it becomes only necessary to provide a rule for their observance, when meeting other

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steamers or sailing vessels going large." Suppose it had stopped here, then I should have said that you had held this: that a steam-vessel was always to be considered as a vessel navigating with a fair wind; and if I had been left to find out what the rule meant, I should have recurred to the preceding paragraph, which states—"When both vessels have the wind large or a-beam, and meet, they shall pass each other in the same way on the larboard hand; to effect which two last-mentioned objects, the helm must be put to port." If it had stopped here, I should have said that that was a fair inference from your having laid it down that a steam-vessel is to be considered as a vessel sailing with a fair wind; and the rule would be, that if it met another vessel coming down the river with a fair wind, they were to pass each other on the larboard hand; and I should have said, without going farther, that the *Menai*, in putting her helm to starboard, and not passing to the larboard of the schooner, violated not a direct rule, but the fair inference to be drawn from what is stated here. But I must look to the rule you have promulgated, and it is my duty and my earnest object to act with the utmost fairness and impartiality to the public and the parties, and I am bound to say, that, with respect to the rules themselves, they do not precisely work out the intention expressed in them. The document purports to provide a rule for steamers in meeting other steamers, or sailing vessels, going down the river: "When steam-vessels on different courses must unavoidably, or necessarily, cross so near, that, by continuing their respective courses, there would be a risk of coming in collision, each vessel shall put her helm to port, so as always to pass on the larboard side of each other." I am afraid this applies to nothing but steam-vessels. Then these words appear: "A steam-vessel passing another in a narrow channel must always leave the vessel she is passing on the larboard hand."

Now giving, as I am bound to do, a just and legitimate construction to these rules, I cannot, in my judicial conscience, say, that these two rules apply; but I can with perfect truth say, that by construction and inevitable in-

ice from the two paragraphs I previously read, they do
s to the same purport ; because when you have once
me that two vessels, both going free, are to pass to the
card side, and afterwards tell me that a steam-vessel is
ys to be considered as a vessel going free, it necessarily
ws that the preceding rule would apply to the present
. Therefore, I have not the least hesitation in telling
that, according to the best judgment I can form, *prima*
; unless some exception is to be engrafted upon these
s, they do apply, and that the steamer *Menai* was to
e in putting her helm to starboard, and that the schooner
nds was right in keeping her course, or slightly putting
helm to port.

ut now let us see whether or not, according to justice and
advantage of the general navigation of the river Thames,
exception can be engrafted upon this rule, though none
entioned in the rule itself.

hat there may be exceptions, I can entertain no doubt—
ptions implied by common sense. I will take the case
vessel going so near to a rock, or to a shoal of sand,
if she followed the rule she would inevitably become a
ck. No person would say that the rule was to be so ap-
d as to produce mischief and loss. Now comes the
stion, whether the exception contended for in the papers
e *Menai*, and urged by Dr. Addams, is a fair exception
e engrafted on the rule or not.

he exception is very well stated in the affidavit of Na-
iel Knight, who is a licensed Trinity pilot : “ It is the
riable rule and practice adopted by all classes of vessels
igating rivers, to take every advantage of the tide which
localities of such rivers may afford ; in conformity
such rule and practice, vessels going with the tide
n the river Thames keep in mid-channel, for the pur-
: of getting the benefit of the tide ; and vessels coming
he said river, against the tide, keep as near as may be to
or other of the shores, and when so coming up the river,
halfway Reach, by reason of the ebb-tide then setting to-
ds the north or Essex shore, keep on the south or Kentish
e, for the purpose of avoiding as much as possible the

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The Friends.

Exceptions.

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The Friends.

strength of the tide." Upon what consideration then is the alleged exception founded? Upon two only—the usage in the river Thames, and the convenience which would result to all parties from continuing to follow that rule, though in opposition to the regulations laid down by the Trinity House; to follow the custom in opposition to your rule. Is this a case for exception? It will be for you to determine whether the great convenience alleged, and the long prevalence of this custom, ought fairly to form an exception to your rules. I cannot pretend to form an accurate judgment as to the extent of the convenience or the advantage which might be derived from adhering to this exception, in preference to the general rule; neither can I pretend to judge as to what has been the established rule and practice amongst those navigating vessels, under these circumstances, in the river Thames. But you are capable of forming an opinion. All I say is this, that if you are about to make an exception to your own rules—an exception which is not to be extracted from any thing to be found in the rules themselves, but to be founded upon the reasons I have alleged,—for the sake of the safety of the navigation of the river Thames, and the great interests which are daily and hourly there at stake, let your exception be clear, definite, and intelligible; let it be made known to the whole maritime and nautical world, that they may avoid the danger they will incur, if, instead of having one direct and clear rule, they have exceptions, not so definite and clear as the rule itself; for unless you lay it down in clear and intelligible terms, it is evident that persons, in all cases, will endeavour to form exceptions for themselves, and, instead of certainty, you will have uncertainty; instead of security resulting from general rules and principles, you will have doubt and danger.

Looking at the extreme importance of this case, I will pray you to take it into your serious consideration, and not to deliver your opinion this day, but give me the benefit of your advice on the next Court day.

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JUDGMENT.

DR. LUSHINGTON.—I understand from the gentlemen

whose assistance I have had the benefit of receiving, that they have taken all the circumstances of this case into their consideration, and they are of opinion that the steamer was to blame, and that the other vessel conducted herself properly, according to the rules of navigation. My judgment, therefore, will be to pronounce against the claim on behalf of the steamer, and to dismiss the owners of the other vessel with their costs.

JAN. 24.
The Friends.

Against the
Menai.

Proctors:—*Toller*, for the *Menai*; *Rothery*, for the *Friends*.

THE "ROSE."—*Act on Petition*.—The *Regina*, a schooner of 132 tons, from Exmouth to Newport, in ballast, and the *Rose*, a steam-vessel, belonging to the Bristol General Steam Navigation Company, on her voyage from Bristol to Cork, came in collision in the Bristol Channel, on the night of the 14th October. The wind was from N. E. or N. N. E.; the schooner's course was E. S. E.; she was closed-hauled on the starboard tack, and running up the Channel, against the ebb-tide, at about four knots an hour. The steamer was coming down the Channel, with the wind free, at the rate of ten or eleven knots an hour, with mainsail, foresail, jib, and topsail set. There was a haze upon the water; the steamer bore three strong lights; the schooner shewed no light. The vessels descried each other at the distance of half a mile; when about a quarter of a mile, the steamer put her helm a-starboard; the schooner put hers to port, hailing the steamer to do the same; but the latter's helm was kept to starboard, and she ran stem on into the schooner, causing her damage, in consequence of which she was soon after abandoned, and ultimately went down.

Collision.—
Construction
and application
of the Trinity
House Rules.
—Responsibility
of a steamer
proceeding with
great rapidity,
and causing
damage.—Car-
rying of lights.

The Court was assisted by Trinity Masters.*

Addams, D., for the schooner. The rule prescribed by the Trinity House required that the steamer should have ported her helm; whereas it is admitted that the helm was put to starboard, and it is asserted that this was a prudent step, though directly in the teeth of the rule. We obeyed the rule and put our helm to port.

ARGUMENT.

* Captain Lock and Captain Weynton.

JAN. 24.

*The Rose.**Pratt, D.*, on the same side, cited the "*Chester*."*

Sir John Dodson, Q. A.—This collision arose from no fault on our part, but from the *Regina* putting her helm to port. I deny that we have violated any rule. The rule, not laid down, but recited, by the Trinity Board,† is this: "Whereas the recognized rule for sailing vessels is, that those having the wind fair shall give way to those on a wind,"—so that the schooner should have kept her course, she being close-hauled;—"that when both are going by the wind, the vessel on the starboard tack shall keep her wind, and the one on the larboard tack bear up, thereby passing each other on the larboard hand,"—which does not apply to the present case; "That when both vessels have the wind large, or a-beam, and meet, they shall pass each other in the same way on the larboard hand, to effect which two last-mentioned objects, the helm must be put to port." Neither of these last rules applies to the present case; the first applies where both vessels are close-hauled; the other where both vessels have the wind large, or a-beam. If the *Rose* had been a sailing vessel, it would have been her duty to have put her helm to starboard (as she did), and by the rules, "stem-vessels may be considered in the light of vessels navigating with a fair wind, and should give way to sailing vessels on a wind on either tack." The *Rose* was, therefore, bound to give way, and bear up; and how could she have done that but by putting her helm to starboard? The schooner had no light, and the master was asleep in the cabin.

Elphinstone, D., on the same side.

SUMMING UP.

Rapid motion
of the *Rose*.

DR. LUSHINGTON.—(*To the Trinity Masters.*) Gentlemen, there appears to be very little difference as to the main and important facts in this case, and the case will in all probability turn upon the opinion which you shall form of the propriety of the conduct of each party under existing circumstances which are hardly disputed. It is admitted on behalf of the *Rose* (the steamer proceeded against), that she was proceeding down the Bristol Channel, after the rate of ten knots an hour; and it is contended on her behalf, and proved by the evidence, that there was a considerable thick

* 3 Hagg. A. R. 316.

† For the Rules, see *ante*, p. 93.

haze hanging on the water, so that it was difficult to discern vessels, and that no vessel could be seen at a greater distance than a quarter of a mile. Now, if it had so happened that the steamer, coming down the Bristol Channel at that rate, had run down a vessel, without either of the parties seeing each other, I should have taken upon myself the responsibility of saying that the *Rose* should pay for the damage, and I will state the reason. It may be very convenient for a part of the public that these steamers should proceed with great rapidity; but the law will not allow them to proceed with this rapidity if the property and lives of other persons are hereby constantly endangered. And the same principle applies to persons proceeding with great rapidity upon land. I well remember that, some twenty-five years ago, the coachman of one of the mail coaches was indicted at the Old Bailey, before Lord Ellenborough, for manslaughter, in having run over and killed a man. His defence was, that by contract with the Post-office, he was compelled to go nine miles an hour. Lord Ellenborough, in answer to that defence, in his summing up, said that no contract with any office, and no convenience of the public, could justify the endangering of the lives of his Majesty's subjects, and the man was convicted of manslaughter, and punished. I apprehend the same principle applies to the present case, and therefore, if the occurrence had happened in the manner I have stated, I should, without asking your opinion, have considered it my duty to say, that, on dark nights, steamers must not proceed at the rate of ten knots an hour. Such being the speed here, as the sailing vessel was going four knots an hour, and she was not seen till they had reached within a quarter of a mile of each other, that interval must have been passed over in only one minute and a quarter, so that there was scarcely a possibility of resorting to any measures for safety.

The *Regina* was proceeding on the larboard tack, her course being E. S. E., and going four knots an hour, with all her sails set, and against the ebb-tide. As soon as she perceives the steamer coming down, she ports her helm; the steamer, according to her own account, does not perceive the schooner till a much later period, and then she star-

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The Rose.

Liability
thereby in-
curred.

Conduct of
the two vessels.

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The Rose.

boarded her helm. Now, you will have to determine, under these circumstances, whether the *Regina* was right or wrong in porting her helm; and the same with respect to the steamer starboarding hers.

Carrying of
lights.

It has been contended that the *Regina* was in fault, because she carried no lights. That point has been discussed over and over again in this Court for twenty-five years; but you have always refused to lay down any rule, that merchant vessels ought constantly to carry lights, and I believe there is no occasion on which it has been laid down, as a general principle, that merchant vessels should carry lights; though, under certain circumstances, it may or may not be right to do so, and that is a point which you will take into consideration.

Relative po-
sition of the
two vessels.

It has been said that the *Regina* was seen one point on the starboard side of the steamer, and that is stated as a reason why the steamer ought to have starboarded her helm. Now it appears to me, that, in all these cases, we never can, with any hope of a satisfactory result, enter into the discussion as to what precise point one vessel bore to another at the time of being discovered; but the true rule is that laid down by yourselves in your own regulations, that so and so ought to be done, whenever there would be a risk of coming into collision, and they apply on all occasions where there is a probable risk of coming into collision. Looking at these facts, it has been contended further, on behalf of the *Rose*, that by your own rules she acted perfectly right, inasmuch as the *Regina* was close-hauled, and the *Rose* being a steamer, and going free, it was right in her to do as she did, because, by so doing, she came within these words, "Giving way to a sailing vessel on a wind on either tack." I apprehend, it is meant to be contended that starboarding the helm was giving way to the vessel on the larboard tack. Whether it was a giving way or not, it will be for you to determine. You will have the goodness to tell me which of the vessels you think was to blame.

OPINION.

Captain WEYNTON. No blame attaches to the *Regina*. The expression "giving way" means, not crossing a vessel's bows, but going under the stern. The *Regina* did right

(considering the short space of time that she saw the other vessel) in porting her helm, and, of course, the *Rose* was entirely in fault. JAN. 24.
The *Rose*.

THE COURT.—In that opinion I entirely concur, and I pronounce for the damage, with costs. Damage pronounced for.

Proctors:—*F. Clarkson*, for the schooner; *Smale*, for the owner.

Prerogative Court of Canterbury.

JANUARY 25.

IN THE GOODS OF THOMAS CARTER.—*Motion, ex-parte.* A will destroyed after death of the testator, who had consented to its destruction before his death.—a copy admitted to probate.

—The deceased died 4th October, 1842, a widower, leaving three children (two sons and a daughter) and eight grandchildren, seven of them minors. It appeared from the affidavit, that he mentioned to his eldest son, T. C., that he had made a will, and had not left any part of his property to his youngest son, R. C., but had given the whole to him (T. C.) and his daughter, A. H., married to J. H. T. C. advised his father to be reconciled to his brother and to destroy the will, and the deceased told T. C. to burn the paper; but the latter did not think this a sufficient authority to act upon, and the deceased never gave up possession of the will, which was found after his death in his pocket. Subsequent to the decease of his father, T. C. made a copy of the will, and then burned the original. The property was only £100.

Deane, D., moved for probate of the copy of the will to *MOTION*. A. H., the daughter and sole executrix, R. C., the excluded brother, consenting.

SIR H. JENNER FUST.—The proceeding of T. C., in declining to destroy the will during his father's lifetime, considering that it should be done by the deceased himself, and, as soon as his father was dead, burning it, is most extraordinary. There is a copy of the will made by T. C., and the other son is not unwilling that probate should pass of this paper, the purport of which is to bequeath the property to

JAN. 25.
Carter, dec.

T. C. and the daughter, to the entire exclusion of the brother, and the question is, whether the Court can act upon the affidavit of the son who destroyed the paper, and give effect to a paper which excludes not only the brother, but the eight grandchildren, all but one of whom are in their minority. The great difficulty is the amount of the property (only £100) to be distributed, in case of intestacy, amongst eleven persons, and which, if the Court were to require the paper to be proved by witnesses, would be consumed. I think there are circumstances in the case, from which the Court may be led to believe that the account given by T. C. is a true representation of the facts. He, it appears, wished that his brother should not be excluded from all share of the property, which is, certainly, not without merit. I think the Court may infer from what is said by other persons on affidavit, that the facts are correctly stated by T. C., and if pleaded, that they would be sufficiently proved by parties who had conversed with the deceased. Some of them doubt whether this is a *verbatim* copy of the will, one person thinking that R. C. had a legacy of a shilling; but this may be a mere impression, from imperfect recollection.

Under the circumstances, I think the Court, looking to the very small amount of the property, may, instead of directing the paper to be propounded (as in strictness it ought to be), safely grant probate of the paper, with the usual limitation. If the property would have borne the expense of litigation, I should undoubtedly have directed the paper to be propounded.

Puckle, Proctor.

Administration, with will annexed, limited to a legacy to certain charitable institutions, granted to their nomi- THE SCHOOL FOR INDIGENT BLIND AND THE WESTMINSTER HOSPITAL v. FLACK AND OTHERS.—*Motion*.—This was a prayer to grant administration, with or without will annexed, of the effects unadministered of Mrs. S. B. to Messrs D. & K., on behalf of the above-mentioned charitable institutions. The deceased died in 1821, and by her will gav

1,000 Three per Cent. Consols to M. B. for life, and upon her death, to the Hospital for the Indigent Blind, and like sum to M. K. for life, and upon her death, to the Westminster Hospital. Her two executors, J. F. and W. H., proved the will, but were dead. The survivor of the two, J. F., died in 1831, leaving a will, in which he named executors, who all proved the same; they were likewise dead, the survivor dying intestate, whereby the chain of representation was broken. On the death of the original testatrix, £1,800 was set apart to satisfy the annuitants under her will, being a part of her stock, and still standing in her name, and the sum of £200 was purchased by her executors, in their name, to meet the legacy duty on the deceased's property. There being no representation to the testatrix, a decree was taken out by Messrs. D. & K., as nominees of the two charitable institutions, citing the persons entitled to a general grant of administration to appear to shew cause why limited administration should not be granted to them, on behalf of the two charities. The Court was of opinion that this application was irregular, and that a Decree should not go out calling upon the parties entitled to accept or refuse a general grant of administration, or to shew cause why a grant should not be made to the two nominees, limited to the sum of £1,800. The Decree was returned, duly served, and no appearance being given thereto,

Addams, D., moved for a limited grant, with or without Motion. The will, the former being the most convenient and desirable course.

SIR H. JENNER FUST.—I have entertained some doubt whether there ought not to be a general grant in this case; but, under all the circumstances, I think a limited grant is the proper form, and, I think, with the will annexed. It is stated that the whole property has been distributed except this sum. I am of opinion that a limited grant, with the will annexed, should go to these two persons, on behalf of the two charities, which will be entitled to the principal when the annuitants die. Some grant is necessary, otherwise the annuitants cannot be paid. [*The Registrar.* In

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*Blind School
v. Flack.*

nees, the chain
of representa-
tion under the
will being
broken and the
parties entitled
to a general
grant declining
to appear.

JAN. 25. ordinary cases there should be a general grant.] Yes, but
Blind School I do not see why the two hospitals should be incumbered
v. Flack. by a general grant.

Nelson, Proctor.

Archbishop of Canterbury.

JANUARY 30.

Church-Rate. NUNN *v.* VARTY AND MOPSEY.—*Appeal.—Allegation.—*
 Construction of a local Act in conjunction with Church Building Acts. This was an appeal from the Consistory Court of London, in a suit for church-rate, on the rejection of a responsive Allegation setting up various grounds of objection to the rate. The suit was brought by the churchwardens of St. John, Hackney, to recover the sum of 3*s.* 4*d.* The case was fully reported in the first volume of these Notes, q. v.*
 1842. Bayford, D., for the Appellant; Addams, D., for the Re-
 Nov. 2 and 11. spondent.

1843. SIR H. JENNER FUST pronounced against the appeal, and
 Jan. 30. affirmed the sentence of the Court below upon the same
 JUDGMENT. grounds: it is, therefore, unnecessary to report the judgment fully.

(After stating the nature of the case, the contents of the Allegation, and the objections made against the rate, which the Court classed under the same heads as those under which they had been classed in the Court below, the Judge read the enactments of the local Statute, 30 Geo. 3, c. 71, and proceeded:)

There is no doubt that the new church and church-yard are substituted for the old church and church-yard, and if there had been nothing else in the Act, all the rights connected with the old parish church and church-yard would have been transferred to the new church and church-yard, and all the liabilities with them, and therefore the question on this part of the Act is, as the freehold was vested in the trustees, what were the liabilities cast upon them?

* 1 Notes of Ca. 191. Since rep. 2 Curt. 877.

It has been argued that the reparation of the church and church-yard by the parishioners rests upon custom and custom only ; that by the general canon law, the *onus* of repairing the church and cemetery was cast upon the incumbent, to be defrayed out of the emoluments ; consequently, when the freehold was transferred from him to the trustees, the same burthen was cast upon them. It is true that, by the general canon law, the burthen of repairing the church did lie on the incumbent of the parish, and a great deal of industry and learning has been displayed to establish the point that, at one time, at least, in England, the repair of the church was thrown upon the incumbent, and that it was only by custom that he was relieved from the burthen, and the repair of the nave of the church was thrown upon the parishioners, and the learned Counsel referred to ancient records and to writers of authority and repute to establish the point, that, at least at one time, that was the law of England. But it seems unnecessary to enter upon this question, since it is not denied, and it is proved by the very authorities which the learned Counsel referred to, that, as early as the beginning of the eleventh century (in the year 1017), in the reign of Canute, even in England, churches were repaired by the parishioners and not by the incumbent, and this came to be the custom universally, and to be the common law of England, as stated by Lord Chief Justice Tindal, in delivering the judgment of the Court of Exchequer Chamber ; for the common law of England, the *ex non scripta*, is nothing but custom, and it being once found that, by the general common law of England, the burthen of repairing the body of the church is upon the parishioners, any exemption from that burthen must be construed strictly ; the general law of England, the common law of England, must prevail, unless it can be shewn that the common law burthen has been modified or altered by special enactment or by necessary implication. I do not understand it is contended that by necessary implication the trustees have this burthen cast upon them ; the utmost extent of the argument is, that the trustees are placed in the same situation as the freeholder in whom the property

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Nunn v. Varty.

Repair of the church lies on the parish.

JAN. 30.
Nunn v. Varty.

vested, namely, the incumbent of the parish. If he was liable to repair the body of the church, then the trustees, who stand in his situation, may be liable; if not, why should they have the burthen cast upon them? When by the law of England, throughout the whole kingdom, the burthen of repairing the church is thrown upon the parishioners, does the transfer of the freehold to trustees cast upon them any other burthen than is laid upon the incumbent, who had not the *onus* of repairing the body of the church? The freehold is in the incumbent, subject to certain rights of the parishioners—to attend the church, to receive the sacraments, and so on. I am clear that, by the common law, the mere transfer of the freehold from the incumbent and the vesting it in trustees did not relieve the parishioners from the burthen of repairing the church and cast it upon the trustees: it must, therefore, be done, if at all, by special enactment.

(The Court then considered the terms and object of the local Act.)

No doubt this Act made a very important alteration in this parish, but it seems to me that the sense of the Act leaves no doubt of the object of the Legislature. All the rights of the rector in the new church, as in the old, were vested in trustees “for the use of the parish,” and although it may be difficult to assign the reasons for vesting these rights in trustees, yet the mere fact of so vesting them is not sufficient to relieve the parishioners from the burthen cast upon them: the freehold was in the incumbent of the parish, though the parishioners were entitled to the use.

The view which the Court has taken of this part of the case is confirmed by a later Act, 35 Geo. 3, directing how the money was to be applied in liquidation of the debt incurred under the Act; that the money so raised by the trustees should be appropriated solely to the payment of the annuities, bonds, and interest.

(The Court then considered how far the Church-Building Acts bore upon the alterations made by the local Act.)

The next consideration is—as the local Act has not transferred the burthen of repairs to the trustees, to the relief of

the parishioners, and as the rate was not to extend over the whole of the ancient parish—with respect to the election of the churchwardens. It is said that no notice was given to the parishioners of South and West Hackney of the election of churchwardens, and that as, under the local Act, very important duties were to be discharged by these persons in their character of churchwardens, and as every parishioner of the two parishes had a vote in the election of churchwardens, they were entitled to notice of the election of these churchwardens. «Undoubtedly, the churchwardens have duties of considerable importance to perform under the local Act, in reference to the church and church-yard, and to the performance of divine service ; they were trustees for carrying into effect the purposes of the Act, and it may be a question how far persons so elected were properly qualified to act as trustees for the purposes of the Act, or under the Poor Law. But this is not a question for this Court to determine ; the only question here is, whether they were duly elected churchwardens for the parish of St. John, Hackney, for the purposes of this rate ? I am of opinion that they were properly elected churchwardens of this parish, and it is provided by the Act that all the parishioners have the power of electing churchwardens, which right is left untouched. It is sufficient if the churchwardens were elected for the parish of Hackney to entitle them to sue for the rate in question before this Court, and I am of opinion that they were properly elected for the part of the parish for which they are churchwardens, and have a right to sue for this rate.

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The next question is, as to the alleged excess of the rate, in which respect I find the Allegation is very vaguely worded ; but it is contended that the rate is excessive, because the churchwardens, if properly appointed, were enabled to obtain under the Act of Parliament means which would constitute a sufficient fund without any rate at all. But it is not alleged that the churchwardens were at any time in possession of such funds ; nothing is said except that sums have been from time to time collected, without saying when and by whom.

Excess of the rate.

JAN. 30. Under these circumstances, I am of opinion that the churchwardens are not before the Court on an excessive rate; that it does not appear that they had a fund out of which the repairs of the church could be defrayed. It was stated in the argument, that the case is the same as that of a rate uncollected, and that the Court would not hold a church-rate valid where the churchwardens could put themselves in possession of funds to defray the repairs of the church. But it appears to me that the case is very different where churchwardens could by their own exertions collect sufficient funds, which is not the present case, for it does not appear that the sums are recoverable, or that they could be recovered without involving the parish in a lawsuit. If the parishioners were of opinion that they were recoverable, they might have directed the churchwardens to recover them. They must be provided with funds beforehand, for a retrospective rate is not legal, and if they expended their own funds in carrying on a suit, how were they to be reimbursed the expenses by the parish? I am of opinion that this case is very materially different from a case of an uncollected rate, and I will not say that, in a case of an uncollected rate, if the churchwardens shew that they had done all they could to collect it, but were unable to do so, the parties being unable to pay, and they were obliged to call for another rate—I will not say that that would not be a sufficient reason for making a new rate.

Not proved. I am of opinion that there is nothing excessive in the rate, and that no circumstances are stated in the Allegation to induce the Court to pronounce the rate invalid on that ground. This disposes of all the objections arising on the construction of the local Act and the general Acts; but there is another point, namely, whether the rate has been properly assessed on the property of the parish. If the rate is unequal, I agree with the learned Chancellor of London that it would be a ground for quashing the rate. But it does not give rise to the question of inequality by merely stating that individuals are rated at a certain sum in the Poor Law Book, and in another sum in the Church Rate Book; for they may be all rated at an under-value; or some

rated in the Poor Rate Book too high and others too low, and they may be properly rated in the Church Rate Book. JAN. 30.
Nunn v. Varty.

In the Allegation, therefore, the question of inequality is not properly raised. If such a question is to be raised, it must be done by stating that some individuals had rated considerably below the value of their property; others considerably above the value of theirs.

Under these circumstances, I am of opinion that the said Chancellor of London came to a right conclusion as to the Allegation, and I perfectly agree with him in opinion, that it does not set up a valid defence against the payment of 3s. 4d. sued for; I therefore pronounce against the Appellant, affirm the sentence appealed from, and I likewise condemn the Appellant in the costs: otherwise, what are the parishwardens to do? If Mr. Nunn takes upon himself to dispute this demand made upon him, and, in the opinion of the Court, does not set up a valid objection to the rate, I think he ought to do so at his own expense, and not at the expense of the parish or of the churchwardens. I think I should stop short of justice if I did not award the costs.

Appeal pronounced against, and sentence of Court below affirmed:

Counsel:—*Scurlock*, for the Appellant; *Pulley*, for the Respondents.

High Court of Admiralty.

JANUARY 31.

THE "AGRICOLA."—*Act on Petition*.—This was an action by the owners of the *Don*, a schooner of Jersey, against the barque *Agricola*, to recover the amount of damage sustained by the schooner by a collision with the barque, on the basin of the Queen's Dock, at Liverpool. The *Agicola* had arrived from the east, and discharged great part of her cargo in London, whence she proceeded with the remainder to Liverpool, on the 8th of September, having taken on board a duly-licensed pilot, under the Liverpool Pilotage Act. Collision. — Effect of the Liverpool Pilot Act in exempting owners from responsibility. — What is a vessel "engaged in the coasting trade." — *Semble*, that the taking a pilot on board voids the exemption.

L. II.

Q

JAN. 31.
The Agricola.
 luntarily under
 the provisions
 of the local Act
 does not ex-
 empt.

pool Pilot Act (5 Geo. 3, c. 73) to carry her up the Mersey. When near the entrance of the dock basin, which she was about to enter, the *Don* was lying close to it, being required to remain there by the pier-master, in order to allow an outward-bound vessel to come out. The *Agricola* was coming in with a strong wind from the N.W., and a flowing tide, at the rate of six miles an hour, and not seeing the *Don* till when near, and when she could not drop her anchor, a collision took place. On behalf of the *Agricola*, it was alleged that the collision was occasioned by the position which the *Don* had taken athwart the entrance to the dock; so that it was impossible to avoid striking her. On the part of the *Don*, it was argued that she was placed in her position by the direction of the dock-master, and that the barque did not keep a good look-out, or proceed with proper caution.

The Court was assisted by Trinity Masters,* in the argument as to the facts, whether the *Agricola* was to blame; if so, whether the blame was attributable solely to the pilot, or solely to the master and crew, or to the pilot and master and crew jointly: the owners of the *Agricola* having set up in defence that, if any fault was to be imputed to that vessel, the pilot was alone to blame, and that the owners were exonerated under the Liverpool Pilot Act and the General Pilot Act, 6 Geo. 4, c. 125, a question of law which could not be raised till the Court was in possession of the facts.

JAN. 24.

Sir John Dodson, Q. A., and *Addams*, D., for the schooner; *Haggard*, D., and *Bayford*, D., for the barque.

SUMMING UP.
Don's case.

DR. LUSHINGTON (*to the Trinity Masters*).—Gentlemen: With regard to the *Don*, the vessel run down, she appears at the time of the collision to have been fastened by a hawser to the pier-head, having entered the basin for the purpose of going into dock, and some temporary delay occurred in consequence of the harbour-master having directed her to slacken the hawser for the purpose of allowing another vessel to go out of dock, so as to sail that tide. Now, it is quite clear that, in so doing, she was acting pursuant to the

* Captain Lock and Captain Weynton.

orders of the pier-master, and not the slightest blame could attach upon her for so doing. But it has been objected to her, that, though she might be in such a condition as to be incapable of making any great efforts to avoid this collision, & to soften the effects of it, yet, at least, she might have done something—namely, have loosened the hawser, and so have occasioned less resistance when the collision actually took place. You will take that circumstance into your consideration, and say whether you are of opinion that she omitted any effort which she had time to make, and which was reasonable to expect she would have made. As far as I can form an opinion, looking at what must be considered the very unexpected occurrence that did take place, I am inclined to think that no blame is attributable to the *Don* in any part of her conduct.

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With regard to the *Agricola*, let us look at the statement in the affidavit of the master, and of his second mate; and they may be fairly judged by that affidavit. It states: "That at half-past eleven A.M. they rounded the rock, and unreeled all the sails, with the exception of the foretopsail, which was still double-reefed; that, as they proceeded up the river Mersey, they clewed up the foretopsail snug, previous to running into dock, the pilot being still in charge; but the wind had by this time veered a little to the W., and was still blowing very hard, with a strong flood tide; that, as they neared the entrance of the Queen's Dock Basin, into which they intended to run, they saw a vessel moored to the north pier-head, and when they rounded her, and were about to run in, they saw for the first time a schooner (the *Don*, of Jersey) lying right athwart the basin." Here are two facts fully admitted on the part of the *Agricola*, namely, that the wind was blowing very hard, and veered a little more to the westward, and that there was a strong flood tide. The necessary consequence from these facts must be, that, whilst she was under sail, she would be going with considerable expedition into the entrance of the basin. She seems to have been aware that such must have been the case, and to have adopted certain measures for slackening her speed. But the true question will be this: being bound

Case of the
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to adopt every precautionary step necessary to ensure the safety of the vessels that might be lying in the basin, whether she adopted all the proper measures, and in proper time—whether she ought not to have clewed her sails (assuming that she so clewed them up at the time she entered the basin) at an earlier period—or whether she ought not to have cast anchor at an earlier period? Because she must have well known, in such a state of the wind and tide, that there was a great way upon the vessel, and that she would not stop immediately that her sails were clewed up. Ought she not, under these circumstances, to have made a just provision for that which was probably almost a necessary contingency?

But it has been said that her sight was intercepted by the tobacco warehouses, and also by a vessel lying at anchor at the point of the north pier. Now, you will consider the operation of these circumstances; but in my opinion, I must fairly tell you, the height of the tobacco warehouses must have been known to the pilot, and if he could not see over them, he had no business to shape his course so as to have his sight intercepted. If he has the wind free, it is his duty to take such a course as to enable him to see what is in the basin; and if he cannot see what is in the basin, it is his duty to anticipate that ships are lying there, and to take that course which is most likely to avoid them.

Questions.

These appear to be the leading and important facts; but there are certain circumstances which must be taken into your consideration, as bearing upon the law, supposing you to be of opinion that the blame attaches solely and exclusively to the *Agricola*; namely, is that blame to be attributed to the pilot solely (who was undoubtedly in charge of the vessel), or is it to be attributed (which I think scarcely possible) to the master and crew solely, or is the blame to be shared between them? because different considerations in law would result from the decision on those points. I think, in cases of this kind, it is my duty to point out a little how some of these facts bear on the question, subject to your better judgment. I think it is clear that the pilot must be to blame, because he was in charge of the vessel; and I think,

that charge, he ought to have adopted or suggested measures which were fit to be taken. With respect to that of a good look-out, it is sworn that persons were "ordered" to keep a look-out; but whether they actually kept a good look-out or not, you must judge from the circumstances; for I am not capable of forming an opinion in which I could rely.

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you will tell me whether you are of opinion that the vessel was assisted solely with the *Agricola*, and, if it did, upon whom—the pilot, or the master and crew, or both?

DAVID WEYNTON.—We are of opinion that the *Don* OPINION.

was in a proper situation, under the direction of the dock-master, and that the blame is solely to be attributed to the

master; and as we have been directed by the Judge to give Pilot of *Agricola* to blame.
the *Agricola* to blame.

COURT.—In order to put the question beyond all doubt, there is nothing in the evidence to satisfy you that the master and crew of the *Agricola* were guilty of neglect or discharge of their duty, in not keeping a look-out, or in any thing which they ought to have done?

DAVID WEYNTON.—No.

COURT.—Then it must be taken that the whole JUDGMENT.
attaches to the *Agricola*, and that the pilot alone was not liable for the accident.

The question of law was then discussed.

By Mr. GARDNER, D.—The *Agricola* had a pilot on board under ARGUMENT.

5 Geo. 3, c. 73, and by reason of his being in charge of the vessel under that Act, and under the General Pilot Act, 5 Geo. 4, c. 125, her owners are not liable. In *Carver v. Sydebotham*,* the Liverpool Act was taken in conjunction with the then existing General Pilot Act, and it was argued on the two Statutes taken together. We rely only on the Local Act, by which the *Agricola* was ordered to take a pilot on board, and even if not compelled

* 4 M. & S. 77.

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to do so, the having a pilot on board would inure to prevent the owner's liability. *The "Maria."** *Lucey v. Ingram.*†—[PER CURIAM. The case of *Lucey v. Ingram* applies to a pilot taken on board in compliance with the provisions of the General Pilot Act; it does not apply to the case of a pilot simply taken on board not under the provisions of that Act—if, for example, you take a pilot on board at sea, which you are not compelled to do.] In *Lucey v. Ingram*, the master was not compelled to take a pilot.—[PER CURIAM. But he might do so under the Act.]

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 JUDGMENT.

DR. LUSHINGTON.—I have had occasion, in many previous instances, to consider the effect of the Pilot Acts, and the various constructions which have been put upon them, and it was a misfortune to me to find that the decisions with respect to the interpretation put upon the Statutes had not been uniform and consistent. But in the cases of the "*Protector*"‡ and the "*Maria*," after the best consideration I could give to the subject, I was of opinion that, under all the circumstances, I was bound to take the course which my judgment directed, and to be guided by no previous decision. Had the decisions been uniform, and I had had the misfortune to differ from them, I should have felt reluctant to adopt my own opinion in preference to such uniform course of decisions; but finding so much inconsistency in the highest authorities, I had nothing to do but determine the question according to the best of my own judgment.

Decisions
 upon the Pilot
 Acts,

conflicting.

I think it would be wholly useless, and not throw any light upon the matter, to enter at any length into the grounds upon which I founded my opinion, and to repeat the observations I made on former occasions. If any novelty shall arise in the circumstances of this case, to that novelty I shall advert; but till my determination shall be overruled by a superior Court, and my conclusions shall be shewn to be erroneous, to that determination I shall adhere to the end.

The facts.

Now with respect to the facts of this case, it is sufficient to state that it appears, from the affidavit of the mate, that

* 1 Rob. jun. 95.

† 6 Mees. & W. 302.

‡ 1 Rob. jun. 45.

essel had arrived from Calcutta in the river Thames, was proceeding from the Thames to the port of Liverpool and it is to be collected from the affidavit of the dock-r, that, at the time she entered the port of Liverpool, as in ballast. On her entering the port of Liverpool, ok a pilot on board, and he was on board at the time llision took place, and it has been determined by the xent of the Trinity Masters, that the collision arose from the fault of that pilot, and is not in any degree attributed to the misconduct or negligence of the mas-d crew. Knowing the importance of this point to the ite decision of the case, I brought it expressly under onsideration of the Trinity Masters. Their opinion ded with my own, that the whole blame laid at the of the pilot, for this obvious and clear reason, namely, t was for the pilot alone to decide upon the proper of entering the basin and as to the time of dropping chor. A question then arose, whether or not, under iverpool Act, or by the General Pilot Act, the owners e *Agricola* were to be relieved from the burthen of ig good the loss which had been sustained.

the Act on Petition, the defence is thus expressed : t, by reason of the premises, and under the provisions e Liverpool Pilot Act, 5 Geo. 3, c. 73, sect. 25,"—so his Act is specifically referred to as a ground of de- , and the attention of the Court is called to it,—“ and e provisions of the General Pilot Act,” the owners are able. In other words, the defence is not grounded ex- rely upon the Liverpool Pilot Act, but upon the com- : effect of the Liverpool Pilot Act and the General Pilot

The same course of argument was followed as in the of the *Attorney General v. Case*, and *Carruthers v. Syde-* m.

ith regard to the Liverpool Pilot Act, the question The Liver- h immediately arises is this: whether the *Agricola*, under pool Act. ircumstances stated, was bound to take a pilot or not— is the first question. Now the Court has been referred rious sections of this Act, and it is clear that, by the ection, a master, being in command of a vessel inward

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JAN. 31. bound, in case he shall refuse to take on board a licensed pilot, is liable to pay full pilotage, unless such vessel shall be in ballast and employed in the coasting trade.
The Agricola.

Now, how are these facts made out? I think that, if this was intended to be relied upon as matter of defence, it should have been specifically stated in the proceedings that this vessel, though inward-bound, was not compellable to take a pilot, by reason that she was in ballast, and was engaged in the coasting trade, for both facts combined are requisite to bring the case within the exception. Now I am bound to take it, on the affidavit of the dock-master, that the vessel was in ballast, for this was a fact within his own knowledge, and is uncontradicted in the cause. But in regard to the succeeding words, I am by no means satisfied that I am entitled to take it as a fact upon his affidavit, that she had "just arrived on a coasting voyage from London." How could he know this but from what he had heard from others? If, therefore, there is any other evidence on this point, to that evidence I must resort. The affidavit of the chief mate states that, in the spring of 1840, he shipped on board the vessel and proceeded in her on two voyages, namely, to Rio de Janeiro and Calcutta, and back to London, and from London to Calcutta, and then with emigrants to Port Phillip, thence to Calcutta, back to the port of London, and from thence to Liverpool. Now, is this a vessel employed in the coasting trade? In my opinion, the vessel does not come within the definition of a vessel engaged in the coasting trade at all, on which ground alone this vessel could have been exempted from the necessity of taking a pilot. The principle upon which vessels engaged in the coasting trade are so exempted is this: because it is supposed that masters of vessels constantly engaged in the coasting trade must be so well acquainted with the localities of the coast, that it would be unjust and oppressive to compel them to incur the expense of a pilot. But here we have a vessel, according to the evidence of the mate, employed for two voyages, which can never be considered coasting voyages, but were foreign trading.

The vessel was in ballast;
 but not a coasting vessel.

But further: if I should have taken an erroneous view of

the case of a vessel proceeding in ballast from the Thames to the port of Liverpool—supposing that a coasting voyage may be in one sense of the phrase a voyage from one port of England to another—this definition is not in conformity to the terms of the Act of Parliament, namely, a vessel engaged in “trading” from one British port to another. In my opinion, neither by the Liverpool Pilot Act, nor on general principle, can this vessel be considered a coasting vessel within the meaning of the Statute. If so, it is clear that the master in command of the vessel, refusing to take a pilot on board, was liable to pay full pilotage, under the 25th section, and, moreover, was also subject to the 24th section, which inflicts a penalty of £5. I am of opinion that the master was compellable to take a pilot; and now let us consider how far, by his so doing, the owners are exonerated from the consequences of such pilot’s misconduct.

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The master
compellable to
take a pilot.

By the Liverpool Pilot Act, there is no such exception; there are no words in that Act which expressly provide that they shall be exonerated, and no construction has been given to the Act to the effect, that *this* Statute confers in terms an exemption from responsibility by reason of a pilot licensed under the Liverpool Act having been on board the vessel. The next point is, whether the responsibility is taken away by the General Pilot Act. How does this question stand? The General Pilot Act, of 6 Geo. 4, I cannot distinguish in any of its enactments from the former Act, 52 Geo. 3. The question has been before the Court of Exchequer and before the Court of King’s Bench, and nothing can be more clear than that the judges in those cases came to different conclusions as to the Act of Parliament, the Court of King’s Bench holding that the Statute did apply to all cases in Liverpool, and to Liverpool pilots; and the Court of Exchequer as clearly holding that the Statute did not so apply; and I should have been extremely reluctant to decide this question on my own judgment, if these decisions had not been different. I have had occasion to enter into this inquiry in the case of the “*Maria*.” I there stated at great length the principle upon which I grounded my decision, and which

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Therefore,
owners ex-
empted.

Whether, if
the taking was
not compul-
sory, owners
discharged of
liability.

I now repeat ; a principle laid down by the learned judges in the case of *Carruthers v. Sydebotham*, and especially by Mr. Justice Le Blanc, namely, that wherever a man is compelled to employ a particular person, the law which so compels him to employ such person must take away his responsibility for the acts of that individual ; otherwise, the grossest injustice would be inflicted, and it would be contrary to every principle of equity. I therefore intend to ground my judgment upon this general principle, and in pursuance of that principle, I must hold in this case, under the circumstances, that the owners of the *Agricola* have made out their exemption.

Before I close my observations, I think it desirable to notice the argument, very properly urged by Dr. Addams, upon the claim of the *Agricola* to exemption on another ground. It has been said that, even if the taking a pilot on board was not compulsory, yet if a pilot was taken in pursuance of the provisions of the Act, the liability of the owners is at an end. In *Lucey v. Ingram*, it was held by the Court of Exchequer that if the pilot was taken on board voluntarily by the master of a vessel, under the provisions of the Act, it was compulsory on the pilot to take charge of the vessel, and the 55th section of the General Pilot Act directs that no person shall be responsible for the acts of a pilot "taken on board in pursuance of the provisions of this Act." The Court of Exchequer held, in that case, that by the taking a pilot on board, though the master was not compellable so to do, yet, being taken on board in pursuance of the Act, by virtue of the enactment, not by the general principle (which was not adverted to), the owners of the vessel were not responsible for the acts of such pilot. But I am not prepared to say that the principle can be extended to a case occurring in the port of Liverpool, where there is no such statutory provision, unless the Act 6 Geo. 4 applies. If the Act does not apply, I will not say that, if a pilot was voluntarily taken on board, therefore the owners are not responsible, for this reason : If the doctrine contended for by Dr. Bayford be correct, that responsibility will not attach upon the general principle, what becomes of

the arguments in the case of the *Attorney-General v. Case*? This doctrine could hold, the discussion there would have been unnecessary, and *a fortiori*, the learned Chief Justice (than whom a more careful judge never sat on the bench) would not but have adverted to it.

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As reference has been made to the case of *Milligan v. The "George"*.^{*} Now I am of opinion that that case will not bear the position to which it has been endeavoured to be extended. That was the case of a licensed drover, employed as the buyer of a bullock to drive the bullock, which did so, and the question was, whether the owner of the bullock was responsible; and the buyer of the bullock was to be exonerated, because he was compelled by the bye-laws of London to employ a licensed drover; he had no choice. But the principle is not applicable to the present case; the distinction is this,—that the owners of the vessel are not compelled to employ a pilot at all. For these reasons, my judgment is founded on the sole ground that the master of the *Agricola* was bound to take a pilot, and the collision arose from the fault of that pilot, for the conduct of the owners of the *Agricola* cannot be made responsible. I therefore dismiss them from the suit.

Owners dismissed.

Doctors:—*Gostling*, for the *Don*; *Tebbs*, for the *Agricola*.

By accident, a part of the Argument in this case (which resumed on the 31st January) was omitted in p. 118. Here subjoined:—

Wyford, D., with *Haggard*. All these Acts merely enunciate the general principle of the law, which would exempt the Statute. The case of *Lucey v. Ingram*, though cited with reference to the General Pilot Act, was founded on the general principle. In a late case, *Milligan v. The "George"*,^{*} a butcher employed a drover to drive a bullock, employed a boy: the owner of the bullock might have done it, but, by the by-laws of the City of London, he could

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^{*} 12 Ad. & E. 737.

JAN. 31. employ no one else. The bullock did damage in a shop, and the question was, whether the owner of the bullock was liable. It was held that he was not; that the drover was responsible, and the boy was the drover's servant, and there was no privity between the boy and the owner of the bullock. That case shews that, even if the master of the vessel was not compelled to take a pilot on board, yet, the pilot being a licensed pilot, and bound under a penalty to employ himself in that capacity when called upon to do so, the person who so employed him, and being thereby obliged to pay pilotage dues, is exempt under the principle of that case.

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Sir John Dodson, Q. A., contra. The first question is, whether the master of the *Agricola* was compellable to take a pilot; if not, the pilot was the servant of the owners, and they are responsible for his acts. Under sec. 25 of the Local Act, a vessel in ballast and in the coasting trade is exempted from the compulsion to take a pilot; and the *Agricola* was in ballast, and she was proceeding from the port of London to Liverpool. But supposing it was obligatory on the master to take a pilot on board, is it settled that the owners are thereby completely exempted? *Carruthers v. Sydebotham* has been cited to shew that there has been an express decision on the point by the Court of King's Bench; but in the case of the *Attorney-General v. Cox*, there was a subsequent decision in the Court of Exchequer of a different tenor: so that it is by no means a settled point. There is no reference in the General Pilot Act to the Liverpool Pilot Act; the case, therefore, must be decided by the Local Act alone, which gives no exemption. The exemption in *Lucey v. Ingram* was grounded upon the pilot's having been taken on board under the provisions of the General Pilot Act.

Addams, D., on the same side. The General Pilot Act can have no application here; the exemption given by that Act is limited to cases where pilots are taken "under or by virtue of any of the provisions of that Act."

Prerogative Court of Canterbury.

FEBRUARY 3.

THE GOODS OF THE HON. LOUISA MARY (OTHER- MARIA) CLIFFORD, SPINSTER, DEC.—*Motion, ex-*
—The deceased died 13th October last, without a
nt, leaving Lord Clifford, of Chudleigh, the Hon. Maria
l, and other brothers and sisters, her next of kin.
tly after her death, W. B., formerly in the service of
ceased, and considered by her a confidential servant,
uced a testamentary paper (A) to the following effect :

A testamen-
 tary paper, re-
 ferring to a will
 not forthcoming,
 — adminis-
 tration, with
 the paper, al-
 lowed to be
 taken, but not
 decreed, on mo-
 tion.

is my will and desire, that whatsoever sum of money my ser-
 W. B., shall say is owing to him by the Hon. Louisa Clif-
 after her decease, confirming the statement by oath, be
 red to him, the said W. B.; and to the sum of money which
 e above-named, shall say is so owing to him, I, the under-
 d, will that, on its delivery to him, shall be added the sum of
 Hundred Pounds. I, the undersigned, will that the above-
 d sum or sums be given to my good and trusty servant W. B.,
 e other sums be given as disposed of in and by my last will
 estament. 1837.

is paper was signed by the deceased, but not attested.
 Weld, the brother-in-law of the deceased, in searching
 he will referred to in the testamentary paper (A), found
 er paper (B) to the same effect, and nearly in the same
 ls, as the other paper, and bearing the same date. The
 referred to could not be found, and as the deceased,
 ly before her death, sent for a solicitor she had occa-
 lly employed, to make a will for her, but for which she
 unable to give intelligible instructions, it was presumed
 she had destroyed the will referred to in the papers (A)
 (B). Both these papers were in the deceased's hand-
 ng, but (B), having been found in her casket, was sup-
 l to be the original. The deceased's effects amounted to
 50, and her debts to about £2,750.

Adams, D., moved the Court to decree Letters of Ad-
 stration, with paper (B) annexed, to the Hon. Mrs. Weld,
 eceased's sister. There can be no doubt that the de-

FEB. 3. ceased intended the paper to operate. Though she had made a will, it is presumed that she destroyed it, and Mrs. Weld is willing to take administration, with this paper (found in the deceased's possession) annexed.

Clifford, dec.

DECREE.

SIR H. JENNER FUST.—The will not being forthcoming, the presumption is, that it was destroyed by the deceased. The application made to the Court is to *decree* administration with paper (B); but I can make no decree. If the parties choose to take administration with the paper, they may; I do not object. But the Court ought to give no direction on the point. I see no reason why this should not be a *bona fide* case; but I can make no decree; the administration must be taken subject to the objections of other parties. There is no appearance of any alteration of the deceased's intentions.

Administration, with the paper, allowed;

but not decreed.

Cor, Proctor.

ADMINISTRATION. — Where the chain of representation was broken, administration *de bonis non* of the original deceased's effects granted to the administrator of a party entitled to such effects by deed of settlement, derived from a legatee in reversion, no next of kin appearing. — Such a grant not absolutely decreed, but open to reconsideration.

IN THE GOODS OF SOPHIA EDHOUSE, SPINSTER, DEC.—*Motion, ex-parte.*—The deceased died in July, 1790, having executed her will, appointing C. F. L. sole executor, but without naming any residuary legatee. C. F. L. proved the will 3rd August, 1790, and having intermeddled in the effects, died in December, 1793, leaving part unadministered. He made a will, appointing C. S. and T. C. executors, and the latter residuary legatee, who proved the will. T. C. survived his co-executor, and died, having made his will, appointing his wife sole executrix, who died in 1825, intestate, without proving her husband's will. The chain of representation was thus broken. Sophia Edhouse, the deceased, had bequeathed to Sophia Spence the interest of £1,000 Three Per Cent. Consols for her life, and after her death, the principal to the aforesaid C. F. L., the sole executor, absolutely. By an Indenture of Settlement, dated 27th November, 1794, between the said T. C. (the executor and residuary legatee of C. F. L.), of the first part, and J. H., of the other part,—reciting that Sophia Spence was then living, and that T. C. had become entitled to the £1,000 stock, subject to the payment of the interest to So-

phia Spence for her life,—it is witnessed that, in consideration of £240 paid to T. C. by J. H., the former transferred to the latter, his executors, administrators, and assigns, this £1,000 stock, subject to the life-interest of Sophia Spence. By an Indenture of Settlement, dated 25th June, 1795, between the said J. H., of the one part, and W. R., a trustee on behalf of Eliz. H., wife of the said J. H., of the other part,—reciting that the said Sophia Spence was still living,—it is witnessed that, for the considerations therein mentioned, J. H. transferred to the said W. R., his executors and administrators, the said £1,000 stock, subject to the life-interest of Sophia Spence, upon trust after her death to pay the interest thereof to such persons as the said Eliz. H. should (notwithstanding coverture), by any note in writing direct, and to transfer the said sum as she should by any instrument in writing, or by will, direct and appoint, and on forfeiture of such appointment, to pay the same to her executors or administrators. By an Indenture tripartite, dated 6th February, 1797, between the said W. R., of the first part, the said J. H. and Elizabeth his wife, of the second part, and T. B., of the third part; it is witnessed that, in consideration of the sum of £200 paid to J. H. by T. B., and for other considerations therein mentioned, W. R., by direction and at the special request of J. H. and his wife, had transferred to T. B., his executors, administrators, and assigns, the £1,000 stock, subject to the payment of the interest to Sophia Spence during her life, to hold the same from thenceforth for ever to and for his and their own use and benefit, subject nevertheless to redemption as therein mentioned. Sophia Spence died in July, 1837, and by an Indenture endorsed on the last-mentioned Indenture, and dated 14th June, 1842, between H. W., of the one part, and J. H. (son of J. H. and Eliz. H.), of the other part,—reciting that the said Eliz. H. died 6th May, 1813, intestate, and that her husband, J. H., had also died in January, 1821, intestate, leaving the said J. H., his only son, him surviving; that Letters of Administration of the effects of the said Eliz. H. and J. H. respectively had been granted to the said J. H. (the son); that the said W. R. had died, and that the

FEB. 3.

Edhouse, dec.

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Edhouse, dec.

said T. B. had also died in March, 1814, having made his will, appointing the said H. W. sole executor, who had proved the same 5th May, 1814;—it is witnessed that, in consideration of £200 paid to the said H. W. by the said J. H. (the son), and for other considerations therein mentioned, the said H. W. released the said J. H. (the son), his executors and administrators, and also the effects of Eliz. H. and J. H. respectively, and particularly the £1,000 stock, from the principal sum of £200 and interest, which by the said Indenture was secured to the said T. B., his executors, &c. The whole of the effects of Sophia Edhouse, the deceased, had been fully administered, except the aforesaid £1,000 stock, which still remained standing in her name in the books of the Bank of England. She died without any known relations, and although advertisements had been inserted in the public newspapers, no next of kin had been discovered, and it was believed that she had left no relations. A decree had been extracted, citing the next of kin (if any), and all persons having an interest in the effects of the deceased, which had been served in the usual manner, and a copy of it had been left with the Queen's Proctor; but no appearance was given.

MOTION.

Addams, D., moved the Court to decree administration, with the will annexed, of the effects unadministered of Sophia Edhouse, to J. H., as administrator of the effects of the said Eliz. H.

DECREE.

SIR H. JENNER FUST.—Decree administration to the party; but in this case, as in all other cases where so much depends upon deeds, if any difficulty should afterwards occur in the Registry, it must be mentioned to the Court again. It must not be assumed that decrees of this kind are not subject to reconsideration, if any difficulty should occur. It is not an absolute decree.

Jennings, Proctor.

Will lost.—*IN THE GOODS OF SARAH DENSTON, WIDOW, DEC.—*
 Motion for limited probate of a copy, un-*Motion, ex-parte.*—The deceased died 18th July, 1840, having, on the 6th June previous, made her will, appointing

J. R. and J. G. executors. Shortly after her death, this will was found in one of her drawers by M. A. H., the deceased's sister, who delivered it to her husband, J. H., in whose possession it remained till the end of 1841, or beginning of 1842, when he gave it to J. G., one of the executors, who deposited it in some place for safe custody, but could not now recollect where, and after diligent search it could not be found. During the time the will remained in the possession of J. H., he had a copy (A) made by his son, M. G. H., which was carefully examined and made to correspond with the original. Shortly after the deceased had executed the will, it was borrowed of her by T. C., a trustee under her husband's will, who then made a copy of it in a book belonging to him, and carefully examined it with the original will, which he then returned to the deceased. T. C. had since examined the paper (A) with the copy made by him, and found it to agree therewith. The draft will (B) was produced by J. G., one of the executors (an attorney's clerk), who drew the will, and the attesting witnesses (clerks to the same attorney) deposed to the due execution of the will, which was a fair copy of the draft (B). By this paper, the deceased purported to appoint J. R. and J. G. her trustees and executors; to give to them her personal estate and effects, and also all monies which should become her property under the will of her late husband, in case her daughter should die under twenty-one without issue surviving, upon trust to pay the interest of her personal estate for the benefit of her daughter till she attained twenty-one, after which to pay the whole of the trust property to her daughter, for her own use and benefit; and if her daughter should die under twenty-one, leaving issue, then she directs her trustees to pay the same to such issue, share and share alike, on their attaining twenty-one, and in case her daughter died under twenty-one, without issue surviving, or if such issue should die under twenty-one, then, out of the trust monies to pay £100 to her brother, M. G. R., and the residue to her sister, the wife of J. H. The daughter had died 15th May, 1842, under twenty-one. The money left by the deceased's husband in trust, for the benefit of the daughter,

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der the circumstances, rejected.

FEB. 3. and on her death under twenty-one to the deceased, amount-
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MOTION. *Deane, D.*, on affidavit of the facts before stated, moved for probate of the paper (A), as containing a true copy of the will of the deceased, to the executors, limited until the original will, or a more authentic copy, shall be brought in: citing *re Cousins*.*

DECREE. *SIR H. JENNER FUST.*—This is a repeated motion, it having been first made in Michaelmas Term, when the Court was of opinion that the case was deficient in many respects, and particularly in that the will was stated to have been executed in the presence of two witnesses, who had subscribed the same in the deceased's presence; but neither of the witnesses had made affidavit as to the execution; the solicitor, by whom the will had been prepared, was not present at the execution, and could not, therefore, give evidence of what had taken place at the time. For this and other reasons, the Court rejected the motion, because it did not appear that the will had been duly executed in the presence of two witnesses, and duly attested by them. A further affidavit has now been made, in which it is sworn that J. G. prepared the will for execution; that the draft (B) has been examined with the copy of the will, and that the will was regularly executed and attested. But the difficulty is, that there is no party before the Court who has an interest in contesting the grant of probate; for by the paper it appears that the £1,400 is bequeathed to the daughter, but if she died before twenty-one, the property is to go to the deceased's sister, Mrs. H., and with regard to the £100, that is to go to the deceased's brother, M. G. R., who, if the deceased has died intestate, would have no interest except as representative of the daughter, for if the deceased is dead intestate, the daughter being dead intestate, without issue, the next of kin will be entitled. Who the next of kin are, I do not know; but I suppose M. G. R. is the next of kin, if the child of the deceased died under twenty-one. What does M. G. R., the brother, say to this? There has been no decree against

* 1 Notes of Ca. 236.

If M. G. R. had assented to the motion, the Court would be inclined to allow probate to pass, because the affidavit does contain circumstances which would entitle the Court to probate if propounded. But I cannot do this without the consent of the brother. What does the brother say? It is not the first time the objection has been made by the brother, for I observe on my note of the former motion the brother said: "The next of kin has a contingent interest." How can we accept an *ex-parte* affidavit against the interest of the brother, he having only £100 under the will? The affidavit is not satisfactory. Let the brother give his consent if he can; I can make no conditions. I must reject the motion at present.

W. C. C. C., Proctor.

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Archbishop of Canterbury.

FEBRUARY 8.

THE OFFICE OF THE JUDGE PROMOTED BY STEWARD Church-rate.
AGAINST FRANCIS.—*Citation.*—*Protest.*—This was a proceeding by Letters of Request from the Consistorial Court at Norwich, at the instance of Mr. Edward Steward, against John Francis, a parishioner of the parish of St. George of the Paragon, Norwich, the Citation calling upon him to answer in Articles "for having wilfully and contumaciously obstructed, or at least refused to make, or join or concur in making of, a sufficient rate or assessment for providing for the necessary repairs of the parish church." To this Citation an appearance was made under protest.

Mr. Francis, D., for the defendant, in support of the Protest. The Citation alleges nothing which amounts to an ecclesiastical offence; and no circumstance is stated therein, as has been done by us, or not done, of a nature to call upon us to answer to Articles. In a criminal suit, the Citation should state the cause of offence. Oughton.*

* *Ordo Judic.* vol. I, tit. xx.

—Jurisdiction.
—Sufficiency of
Citation.—The
having wilfully
and contumaci-
ously obstruct-
ed, or refused
to make, or join
or concur in the
making of, a
sufficient rate,
is an ecclesiastical offence.—
Protest over-
ruled.

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ARGUMENT.

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Gaill.* What is meant by "wilfully obstructed?" What is the meaning of the term "obstructed?" The Citation goes on in the alternative, "or at least refused to make, or join or concur in the making," a rate. Where is the crime in this? There is nothing to shew that the consequence was, that the parish church is out of repair. It is averred that the obstruction or refusal was wilful and contumacious; but there can be no contumacy without a Monition, and it is not said that any Monition has been taken out. In *Cooper v. Wickham*,† in which a party was proceeded against in the Court of Wells for voting against a church-rate, he being a churchwarden, the Court said it was impossible, on the face of the Citation, to hold that it set forth an ecclesiastical offence, because it did not appear that the rate was necessary, and that by its refusal the repairs of the church had been neglected; and it added that the proper way to meet such a case was by appearing under protest. There are other grounds of protest. If it be meant that a person can be proceeded against for refusing to vote at a vestry, or refusing to concur in a vote, I deny that such is the law. I admit the obligation of the parishioners to repair their church, and that, if they do not, they may be cited before the Ecclesiastical Court and punished; but I deny that they are liable to punishment for refusing to vote in vestry in favour of a rate. The origin of this obligation to repair the church may be very ancient; but that the doing it by rate is equally ancient, I deny. It is not mentioned in the Statute *Circumspectè agatis*.‡ In the Constitution of Archbishop Stratford, there is no reference to any thing more than a general obligation of the inhabitants to contribute to the repairs of the church rateably, "according to their possessions and rents."§ A rate cannot be enforced by any proceeding at law; if this had been a common law obligation, arising from custom, there could be no difficulty in enforcing it in the Courts of Common Law, which, however, refuse a *Mandamus* for making a rate. All the authorities shew that a rate must be made by consent of the

* Obs. 51.

† 2 Curt. 303.

‡ 13 Edw. 1, St. 4, c. 1.

§ Lind. Prov. 255.

majority of the parishioners, which implies that there may be dissentients, and that they may dissent without being subject to ecclesiastical censure. Are the parishioners, when assembled in vestry to make a rate, to be compelled to vote a particular way? When is the offence completed? A man may innocently and conscientiously oppose a rate. Who is to judge of its propriety? The Ecclesiastical Court cannot; the churchwardens cannot; but if you can proceed against a party for not concurring in a rate, you give the churchwardens a right to judge of the *quantum* of the rate. There is no precedent in Archdeacon Hale's book* for a criminal proceeding against a party for not concurring in a rate.

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Harding, D., on the same side.—If the Court overrules the protest, it will settle the law on the point, as the Citation must shew on the face of it an ecclesiastical offence. The Court, as it stated in *Cooper v. Wickham*, is not at liberty to indulge in conjecture, or to presume any thing; and if so, on that case alone, the other side is out of Court. They have not stated that, by reason of our conduct, the church is out of repair, and the Court cannot presume it. The Citation should have alleged the non-repair of the church, as well as the necessity of the rate, and whether the resolution was carried or not. The only thing on the face of the Citation is, the refusing to join in making a rate, which is no ecclesiastical offence. The Court cannot presume that any vestry was ever called, and the rate must be made in vestry; nor that the party had a vote, and he may have refused because he had not the power; nor that any rate was asked for; nor that he voted against any specific rate, the words in the Citation being "a sufficient rate"; nor that the repairs were not actually done. Lindwood,† citing Archbishop Reynolds, says: "*Si aliqui qui tenentur ad reparationem contribuere et dum possunt nolunt, vel nimis remissi sunt, tales, monitione præmissâ, potest ad hujusmodi contributionem compellere.*" So that monition must precede excommunication. [PER CURIAM.—Is it ne-

* *Precedents in Causes of Office against Churchwardens*, 1841.

† *Prov. lib. 1, tit. 10, p. 53.*

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cessary for the Court to proceed at once to excommunication? May it not at first monish?] Suppose that, in *Cooper v. Wickham*, the principle was laid down too broadly, or that it is bad law, and the Court now recedes from it, then we contend that this is no ecclesiastical offence taken at the worst. *Millar v. Palmer*.*

Sir John Dodson, Q.A., for the promoter, in support of the Citation.—The Ecclesiastical Court has the sole jurisdiction in respect to church-rate; the only question is as to the mode of enforcing its jurisdiction. Lindwood, in the passage cited by Dr. Harding, says: "This (the obligation to repair the fabric of the church under a penalty) cannot intend here the penalty of excommunication, inasmuch as it concerns the parishioners *ut universos*, as a body or whole society, who are bound to repair the fabric of the body of the church: for the pain of excommunication is not inflicted upon a whole body together, although it may be inflicted upon every person severally who shall be culpable in that behalf." Therefore, persons who refused might be proceeded against, and not those who were willing to do their duty to the church. The Court may infer that there have been proceedings against individuals upon this ground from a case recorded in the *Register Brevium*,† in which an inhabitant of a parish in the diocese of Lincoln was proceeded against for neglecting or refusing to repair the parish church. But it is said, there is no precedent for proceeding against a party for not making a rate. How soon church-rates commenced, it is not easy to make out; but the rule and principle of the law, that the parishioners are liable personally, according to the amount of their property in the parish, has existed for a great length of time, before the memory of man. In *Veley v. Gosling*,‡ the Chancellor of London went into the history of church-rates, and stated that they existed in the reign of Edward 3. In *Cooper v. Wickham*, there was no averment that the parish church was out of repair, or that the rate was for the necessary repairs of the church; in this Citation, it is alleged that the rate was for "the ne-

* 1 Curt. 540.

† *Reg. Brev.* 44 a.

‡ 1 Notes of Ca. 457.

cessary repairs of the parish church," and that the rate was refused. If the church was out of repair, and a rate was necessary, the party committed an offence if the church was afterwards repaired by voluntary contributions. It is said, we should have first proceeded by Monition: how is it known that we did not? In *Greenwood v. Greaves*,* which was an appeal from York to the Delegates, in which a party was proceeded against for "refusing to make, or concur in making, a rate or assessment, or sufficient rate or assessment, for the repairs of the parish church," the Court said, "If it had been alleged that the parishioners contumaciously, obstinately, and pertinaciously refused to make a rate, there might be some ground for proceeding against them; but there was no appearance of wilful contumacy." It is apparent on the face of this Citation, that the church was out of repair, and the party having "wilfully and contumaciously" refused to make a rate (which implies that it was at the vestry), an ecclesiastical offence is sufficiently alleged. *Millar v. Palmer* was a case entirely different from this.

Phillimore, D., on the same side.—According to Gaill, it is sufficient that the Citation should set forth generally the nature of the offence. It is not necessary, by the practice of the Court, to state the whole history of the case in the Citation.

Addams, D., on the same side.—In *Cooper v. Wickham*, the Court spoke with reference to the Citation and Allegation taken together; it did not refer to the Citation alone.

PER CURIAM.—I must take time to consider this case. *Cur. adv. vult.*

SIR H. JENNER FUST.—The question for the Court to determine, in substance and effect, is this; whether the Citation does or does not charge an offence cognizable in the Ecclesiastical Court.

Now the first thing to be considered is, what is the jurisdiction of this Court in matters of repair of churches and of church-rate. It would be a waste of time for the Court to enter into the history of church-rates, or of the jurisdiction of these Courts in that respect, for it has been declared by

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The jurisdiction of the Court.

* 4 Hagg. E. R. 77.

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high authority, that the cognizance of repairs of churches, and the enforcing of rates for the repairs of churches, if not exclusively within the cognizance of the Ecclesiastical Court, are within its power and authority. This doctrine was laid down without doubt or hesitation, both by the Court of Queen's Bench* and by the Court of Exchequer Chamber,† in the Braintree case, and therefore the Court does not think it at all necessary to go into any general exposition of the doctrine on this point. As little can it be doubted that the duty of the parishioners to repair the parish church is a common law obligation, to be enforced by the Ecclesiastical Court; that it is a duty from which they cannot relieve themselves; that they are bound to perform that duty, and may be compelled to do so—how and in what manner there may be some doubt: whether the churchwardens, if the parishioners refuse to make a rate for that purpose, may make one themselves, or with the minority of the vestry, which can be enforced by ecclesiastical censures, and to what extent: as far as regards the mode of enforcing such a rate, a question might be raised. But it was sufficiently established, in the Braintree case, by the judgment delivered by Lord Chief Justice Tindal, in the Exchequer Chamber, that the Ecclesiastical Court has jurisdiction to enforce this common law obligation. Speaking of the Statute *Circumspectè agatis*, he observes: "Upon the construction of this Statute no doubts have ever been raised or can exist, that the Spiritual Court has power and jurisdiction, by ecclesiastical censures, to compel the churchwardens to perform their duty in relation to the repairs of the church; to compel the parishioners to perform their duty in providing the means to make such repairs, and, after a legal rate has been imposed, to compel each individual to contribute the sum assessed upon him;" laying it down, therefore, that it is the duty of the parishioners to repair the church, and that the Ecclesiastical Court has jurisdiction to compel them to perform this duty. Therefore, as Lord Chief Justice Tindal lays it down, as a legal proposition on which

* *Burder v. Veley*, Rogers' *Eccl. Law*, 1009*.

† *Veley v. Burder*, 12 Ad. & E. 305.

no doubt can exist, that the repair of the church is obligatory upon the parishioners, and that it is in the power of the Ecclesiastical Court by canonical censures to compel them to provide the means, the Court will now proceed to consider the particular circumstances of this case, and the objections made to the Citation; for the question arises on the Citation, and not on the Articles.

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Now the question which arises is, what is necessary to be stated in the Citation to compel a party to appear? The matter being of ecclesiastical cognizance, that the Citation must shew the nature of the charge imputed to the party, is a point agreed on all hands; but the question is, whether the Citation should specifically state all the circumstances, or whether it is enough to give a general description of the charge, so that the party may be sufficiently informed of what he is called upon to answer.

What is necessary to be stated in the Citation.

There has been a good deal of argument to shew why, in this case, there should be a specification, by every thing being fully set forth in the Citation, to render the party liable to be called upon to answer; that it is not sufficient to give a general description, but that there should be a specification. The authority of Oughton and of Gaill has been referred to; but I must look at the present practice of the Court, rather than to the authority of these writers, though I do not consider that Oughton or Gaill says that the charge should be so specified in the Citation, that all the circumstances under which the offence was committed should be set forth; but that a general description of the offence should be given, in order that the party may know how to meet it, and whether it is of ecclesiastical cognizance.

What is done in other cases—in a case of brawling, for example? It is only necessary to state the offence and to shew that it is within the cognizance of the Ecclesiastical Court; it is not necessary that the words should be set forth; it is enough that the party should be cited “in a cause of quarrelling, chiding, and brawling by words, in the parish church of so and so,” leaving the Court to decide whether the particular words used on the occasion constituted an offence—it is sufficient for the Citation to set forth “brawl-

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ing by words," under the Statute, in the parish church, to call upon a party to answer. In the case of a proceeding for excess against a clergyman in the performance of divine service, in order to call upon him to answer Articles to be administered to him for irregularities, it is not necessary to state specifically the nature of the irregularities. Thus in *Bennett v. Bonaker*,* which was a proceeding against a clergyman for irregularities in the performance of divine offices, and for removing the soil of the church-yard, there was only a general description of the charges. So in *Sanders v. Head*, recently before this Court, it was set forth in the Citation that the party, in a particular newspaper, published certain letters, importing erroneous doctrines, not setting forth the particular words constituting the offence: it was a general description of the case, shewing that it was of ecclesiastical cognizance, but not setting forth the specific words used by him. On the general principle, I am of opinion that it is not necessary that the Citation should do more than state generally the nature of the charge imputed to the individual against whom the office of the Judge is promoted; that it is not necessary to enter into a specification of all the circumstances under which the offence was committed—they would be set forth in the Articles—but in the Citation it is sufficient to state the nature of the charge, and that it is within the cognizance of the Ecclesiastical Court.

The nature
of the charge
generally;

and that it is
within the cog-
nizance of the
Court.

The case of
*Cooper v.
Wickham.*

In the course of the argument, reference was made to a decision which the Court itself gave in the case of *Cooper v. Wickham*, and the Court has been told that, if it overrules this protest, it must stultify itself and vary the practice of the Court; I must therefore endeavour (as I intend to overrule the protest) to shew that the cases are distinguished from each other, and to reconcile the doctrine in the two cases.

A copy of the process in the case of *Cooper v. Wickham* is now with the Registrar, and it may be necessary to refer to it, in order to shew what that case was, what was the

* 1 Hagg. E. R. 17.

nature of the charge, and what is the difference between the two cases.

Now a good deal of observation has been made upon the manner in which the Court expressed itself on that occasion, and in one particular part of the judgment of the Court, it stated that the Citation was not sufficiently specific, and I have no hesitation in saying that the charge should be stated in the Citation, not specifically, but generally, so as to shew that it is of ecclesiastical cognizance. It is necessary to consider the nature of that proceeding, for many expressions fall from the Court, in giving its judgment, which may seem to imply that the doctrine is laid down generally, whereas, in many cases, it applies to the circumstances of the individual case then before the Court. And there is another observation to be made; in considering a judgment delivered by the Court, expressions may be used by the Court which have reference to particular arguments employed in the case, and it is hardly fair to take expressions so reported without the arguments of the Counsel, and in half the ordinary cases reported from the Courts of Law, the judgments of the Courts are reported without the arguments of the Counsel. It must be clear that, in many cases, the judgments must be unintelligible for want of the arguments of Counsel.

The Citation in *Cooper v. Wickham* called upon Job Cooper, of the parish of Shepton Mallet, in the diocese of Bath and Wells, one of the churchwardens of that parish, to answer to certain Articles, touching and concerning his office of churchwarden, and more especially for having, at a vestry, duly held on the 31st January, 1839, for the purpose of making a church-rate, voted in favour of a resolution to the effect "that a church-rate being at all times bad in principle and unjust in practice, and quite uncalled for at the present time, the question be adjourned till that day twelve months;" and also for voting against a church-rate duly moved and seconded. That was the offence he was called upon to answer "touching and concerning his office of churchwarden." Now the whole of the charge imputed to him was in his office of churchwarden, and it was with

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respect to that charge that the Court was of opinion that the proper way to have met it was to have appeared under protest, as it imputed nothing at all of an ecclesiastical offence, that he, as one of the churchwardens, had voted against all church-rates and against a particular rate duly made and seconded. What did the charge import? That the church was in want of repair? That the church remained unrepaired, because the resolution was carried? That he was a party, in his character of churchwarden, to any neglect of his duty to repair the church? Did it appear that the rate was for the necessary repairs of the church? No; nothing of the kind; but simply that he voted for a resolution against church-rates and against a particular rate duly moved and seconded. A rate may be duly moved and seconded, and yet be altogether excessive, and infinitely higher than what is required, and therefore, on the face of the Citation, there was nothing to call upon the party to answer in his character of churchwarden; and the Court expressed its opinion that, if the case had come before it in the first instance, it would have refused to allow its office to be promoted, or if the party had appeared under protest, and the protest had been overruled in the Court below, and he had appealed, the Court would have pronounced for the appeal and dismissed the party. But the case came before the Court after the Articles had been admitted in the cause, and it was with reference to the Citation and the Articles that the Court expressed itself as it did. Now the vestry had been called in January, 1839, and the resolution was passed at that vestry; the Citation, however, was not taken out till April in that year, and the Articles were not given in till June, and therefore, this being a proceeding against the party in his office of churchwarden, the Court thought that, in the interval between the meeting of the vestry and the giving in of the Articles, the church might have been put into repair, and if so, as against him in his office of churchwarden, there was no ground for the proceeding. The first Article did aver that the church was in a dilapidated state in January, 1839, and therefore required to be repaired, and there can be no doubt that that

cle, standing by itself, was very proper to be admitted, did aver the necessity of the repairs. But the Article, in the second place, alleged the calling a vestry, pursuant to the 10th, to make a rate for the repair of the church, at which the estimates were submitted, not by both the churchwardens, but by Mr. Wickham alone; that a resolution (an affirmative resolution) was moved and seconded by two dissenting ministers, and that Mr. Cooper, in violation of the duty and of his duty and obligation as churchwarden, voted in favour of the resolution, and also against the rate of two pence in the pound, duly moved and seconded. So that the offence charged in the Articles against Mr. Cooper was "in violation of his duty and obligation as churchwarden." Now, in the first place, as to the resolution itself, the Court expressed its opinion, that the charge contained nothing against him in violation of his duty as churchwarden. Churchwardens may be elected to the office of churchwarden, dissenters may be compelled to serve the office, and I do not know of any dissenters, filling such office, if he does entertain conscientious scruples against church-rates, is punishable for expressing that opinion; I do not know that it is obligatory on a churchwarden to vote for any rate duly moved and seconded, or not to vote against a rate of two pence in the pound, unless it is not inadequate to or in excess of the expense for which it is required. Annexed to the Articles was the notice given of the vestry and the estimates specifying the purposes to which the rate was to be applied, and the estimates may have been very moderate; but Mr. Cooper may have judged them to be excessive, and might have been justified in voting against the rate on that ground. Now this was the case of *Cooper v. Wickham*, in which the Court expressed itself in the manner alluded to in the report, and as appears in the report, of the accuracy of which I see no reason to complain; I have no doubt that the expressions of the Court are correctly given, and I am inclined to depart from any part of those expressions: I am of opinion that it is necessary to state the nature of the charge which the party is called upon to answer, and the offence is of ecclesiastical cognizance. In that case,

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the Court was of opinion that the charge was not sufficiently set forth, and that there was nothing to shew that Mr. Cooper had been guilty of any neglect or violation of his duty as churchwarden, by voting against church-rates in general as "at all times bad in principle and unjust in practice," or by voting against a particular rate of twopence in the pound, and the Court adheres to what it said in that case.

Two other cases were adverted to in the argument. In *Greenwood v. Greaves and others*, before the Delegates, all the parties proceeded against, twelve in number, were included in one Citation; the Court of York rejected the Articles, and the Judges Delegate were of opinion that they contained no charge against them of a canonical offence, as there had been no wilful or contumacious refusal, and they affirmed the decree appealed from.

Again, the case of *Millar v. Palmer* was a proceeding against a churchwarden for neglecting or refusing to obey the Monition of the archdeacon, who had given directions for the repair of the church. But is the present case distinguished from *Cooper v. Wickham* and the others to which I have alluded? In *Cooper v. Wickham* the distinction is this: the Court was of opinion that the Citation did not set forth, and it did not appear from the Articles, that the party had been guilty of any ecclesiastical offence; it was not alleged that the church was in want of repair at the time the Citation issued. But what is the offence charged in this case? In the first place, there is "wilfully and contumaciously obstructing the making of a rate." No such words, or any thing of the kind, appear in *Cooper v. Wickham*, but simply an averment that the party had voted for a certain resolution and against a rate, without even stating in the Citation that the repairs were necessary. Here the party has been "wilfully and contumaciously obstructing" the rate; that is the first charge.

It has been said that a person cannot be contumacious unless there has been a Monition against him, and he has disobeyed it: that was argued by one of the learned Counsel, and perhaps correctly argued, for certainly a person is

not contumacious unless he has been guilty of some disobedience to the Court by omission or commission. But supposing this to be incorrectly expressed, what then? The very word, however, implies that there has been a Monition. I am told that a party can only be excommunicated (one of the modes of proceeding) *monitione præmissa*. Be it so: if there has been no Monition, the Court will not proceed to excommunicate without a Monition. But, perhaps, there has been a Monition, and if there has been no Monition precedent, the party may be liable to a Monition now. But the question is, whether the obstructing the making of a rate is not an ecclesiastical offence, and liable to be punished in some manner, either by excommunication or by Monition.

But the charge goes on: "or, at least, refused to make, or join or concur in the making of, a sufficient rate or assessment for providing funds, in order to defray the expense of the necessary repairs of the parish church." In the first place, he is charged with wilfully and contumaciously obstructing the making of a rate; the second averment is, that he refused to make or concur in the making of a rate: in either case, the offence is sufficiently stated, and distinguishes the case from that of *Cooper v. Wickham*. The levy was not more than sufficient to defray the necessary repairs, so that it is not a proceeding against a party (as suggested) for voting against a rate simply, but for voting against, or not concurring in making, a *sufficient* levy for the *necessary* repairs of the church: every thing, therefore, concurs to constitute this an ecclesiastical offence.

I am, therefore, of opinion that the Citation does sufficiently set forth what is imputed to the party, and it being admitted on all hands that the Ecclesiastical Court may proceed by ecclesiastical censure to compel the parishioners to repair the parish church, it follows that it must be by proceedings against individual parishioners. For what was the *Braintree* case? The inhabitants of Braintree say, "You cannot levy a rate unless with the consent of a majority of the parishioners," and it has been so held, to a certain extent—whether correctly or not will be hereafter determined in this Court, where the question is now under considera-

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tion. But the parishioners of Braintree say, "You shall not have a rate unless it be given by a majority," and the inhabitants of St. George Colegate, Norwich, say, "You shall not proceed against any individual for not concurring in the making of a church-rate;" and if this were the case, the power of the Ecclesiastical Court to compel the parishioners to do their duty—which Lord Chief Justice Tindal has stated is the undoubted power of the Ecclesiastical Court—cannot be exercised at all. But there is no doubt that excommunication might be issued, not against the whole body of the parish *ut universos*, including the innocent with the guilty, but against individuals who obstruct the making of a rate.

I am of opinion that I must overrule the protest, and I think I may safely do so without deviating from, or diminishing the effect of, the observations of the Court in *Cooper v. Wickham*, as there is a material distinction between the two cases. That case was a proceeding against a party, in his character of churchwarden, for voting for an abstract proposition and against a rate—that is, simply refusing a rate. Here the charge is, that the party obstructed, or refused to concur in, the making of a *sufficient* rate for the *necessary* repairs of the church—implying that the church was out of repair, and that the rate was necessary.

I overrule the protest, and assign the party to appear absolutely, reserving the question of costs.

Proctors:—*Blake*, for the Promoter; *Prichard*, for the Defendant.

High Court of Admiralty.

FEBRUARY 10.

Collision.—
The Trinity
House rule.—
An exception
claimed, on
account of the
darkness and
the relative

THE "COLUMBINE."—*Act on Petition.*—This was an action by the owners of the brig *Undaunted*, of Newcastle, against the *Columbine*, steam ship, belonging to the General Steam Navigation Company, to recover the amount of damage sustained by the brig in a collision with the steamer

in the Swin, on the morning of the 3rd October last. The brig, burthen 272 tons, with a crew of ten hands, from London to Newcastle, in ballast, arrived in the Swin, off Harwich, on the evening of the 2nd October, where she cast anchor, to wait the ebb tide. About half-past twelve, on the morning of the 3rd, she weighed and stood N. W. and by N., tacked and stood on the larboard tack, close-hauled upon the wind, with all sails set, lying E. by S., the wind blowing a moderate breeze from the N.E. by N., the vessel making $3\frac{1}{2}$ knots. It was alleged on her part, that the night was fine and clear, and that a good look-out was kept; that, about one o'clock, the *Columbine* was seen coming in an opposite direction, a point and a-half on the brig's larboard bow (E. $\frac{1}{2}$ N.), going at the rate of ten knots; that they hailed, notwithstanding which, the steamer, instead of altering her course, closed in upon the brig, and a collision being thereby inevitable, the helm of the brig was starboarded, to prevent the steamer running her down, but she struck the brig, and caused her considerable damage. On the part of the *Columbine* (a vessel of 242 tons, with engines of 160-horse power, and a crew of twenty men, bound from Rotterdam to London, with passengers, goods, and the mail) it was alleged that the night was dark and somewhat hazy, when, in the Swin, off the Essex coast, between the Sunk Sand and the Gun Fleet Sand, running at about seven knots, steering W. $\frac{1}{2}$ S., the *Undaunted* was observed between two and three points on the *Columbine's* starboard bow, steering upon the wind, and distant three or four vessels' length, and that she could not be seen at any greater distance on account of the darkness and hazy weather, the brig not having any light hoisted; that a good look-out was kept on the *Columbine*, which had three lights; that the brig was hailed to put her helm hard a-starboard, as that of the *Columbine* was immediately put, as the only means of avoiding a collision, the engines being at the same time stopped; and that, had the brig's helm been put a-starboard when she was hailed, no collision would have ensued.

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The Columbine.

position of the vessels, but not sustained.

FEB. 10. The Court was assisted by Trinity Masters.*

The Columbine.

ARGUMENT.

Haggard, D., for the *Undaunted*.—With regard to the brig having no light hoisted, the Court said, in the recent case of the "*Rose*,"† it had never been laid down as a rule that merchant vessels ought to carry lights. The surveyor's report of the damage sustained by both vessels confirms our statement of the occurrence. If the night was dark and hazy, as they allege, the steamer was not justified in going with such rapidity as ten knots an hour through the Swin.

Robertson, D., on the same side.

Addams, D., for the *Columbine*.—The evidence preponderates in favour of the night having been dark, cloudy, and somewhat hazy; it was, therefore, impossible to discover at any distance the direction in which a vessel without a light was sailing. Although it is not obligatory upon merchant vessels constantly to carry a light, ought not the brig to have shewn or hoisted a light when she saw the *Columbine*? The commander of the steamer is an officer of skill and experience, and has been in the service of the Company for many years. Their vessels are employed in carrying the mails, and there is no probability that there should not have been a good look-out on board the *Columbine*.

Robinson, D., on the same side.

SUMMING UP.

DR. LUSHINGTON (*addressing the Trinity Masters*).—Gentlemen, some arguments have been addressed to you by the Counsel for the *Columbine*, which render it necessary for me to offer some observations to you which I had not originally contemplated. It has been argued, that the burden of proof rests upon those who prefer a claim to be indemnified for the damage which was the consequence of the collision. No doubt, that is, to a certain extent, perfectly true. They are bound to make out the facts and circumstances requisite to lead to the conclusion that the other party was alone in fault. But if a defence is set up on behalf of the vessel proceeded against, to establish that defence she is equally bound to prove the facts upon which she relies for her defence. Now it frequently happens, in

* Captain Rees and Captain Probyn.

† *Ante*, p. 104.

these cases, that the blame may rest in a very different manner. For instance: it may rest upon the vessel proceeded against; or it may rest upon the vessel which is the plaintiff; or it may rest upon both; or it may be the effect of mere accident.

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Now let us look at some of the facts, and then consider what would be the proper conclusion to draw from them, both as regards your nautical knowledge, and as regards the inference of the law. The facts are shortly these: that the *Undaunted* was going down the river, close-hauled; the steamer was coming up the river, with the wind free behind her. It has been admitted on behalf of the *Columbine*, that the general rule under these circumstances would be, that the steamer should give way, and for this reason: the *Undaunted* was close-hauled, and the *Columbine* was not only a steamer, but had the wind free or large.

Having admitted the general principle, the defence set up is two-fold; first, that it was so dark a night that they could not descry (supposing them to have kept a good lookout) the *Undaunted* at a greater distance than three or four ships' length; and, secondly, that she was seen from two to three points on the starboard-bow, and therefore they were justified in starboarding the helm, and not porting; and, thirdly, they say that, even if this should fail, the *Undaunted* was to blame, because she ought to have hoisted a light as soon as she perceived the *Columbine*, which she failed to do; and then, further, they say, that the *Undaunted*, having perceived the steamer, ought to have starboarded her helm sooner. The whole of the defence, then, divides itself into two parts—a case of necessity, in which she adopted the best measures in her power; and a charge against the *Undaunted*. Let us examine the facts as to the conduct of the *Columbine*.

It is admitted that she starboarded her helm, and that she pulled on the *Undaunted* to starboard hers, contrary to the general rule. As to the night, the master of the *Columbine* himself states "It was dark and somewhat hazy." That is the sum-total of the evidence on this point. Some of the witnesses say it was very dark; but they are contradicted

Conduct of
the *Columbine*.

FER. 10. by the evidence on the part of the *Undaunted*, that it was a clear night. But take it to have been rather hazy; if a good look-out had been kept on board the *Columbine*, it would be difficult to say that she ought not to have seen the *Undaunted* at a greater distance than three or four ships' length. But even at the distance at which she was seen, I have some doubt whether the measures she pursued were not altogether wrong. But then she justifies those measures, because the *Undaunted* was seen from her starboard bow; whereas the statement of the persons on board the *Undaunted* is, that the *Columbine* was seen a point and a-half on the larboard bow of the *Undaunted*. But I will suppose (in order to do perfect justice to the *Columbine*) that she did see the *Undaunted* from two to three points on the starboard bow; does that make any difference? This is a question which has been discussed here more than once, and according to the Trinity Masters, and my mind has always concurred in its propriety, the rule is this: You cannot depend upon the evidence of witnesses on one side or the other upon these precise points; but if vessels are so approaching each other that there is a chance of collision, it is to be avoided by an adherence to the rule. Subject to your better judgment, I am of opinion that the *Columbine* has not made out any justification of her own conduct; that neither the haziness of the night, nor the point from which the *Undaunted* was seen, was sufficient to justify the violation of the rule; and I repeat what I have said before, that to these general rules and principles I am reluctant to admit of exceptions unless necessity calls for it.

Charge against the *Undaunted*.

Now let us look at the charge against the *Undaunted*, on the subject of hoisting a light. It is true, there is a broad distinction between constantly carrying a light and hoisting a light; but whether it was proper to hoist a light under the circumstances, I rather leave to your judgment.

With regard to the last point, that the *Undaunted* should have starboarded her helm, she was only justified in doing it at all by absolute necessity, to avoid the collision—she was perfectly justified at the last extremity in doing any thing that might diminish the force of the blow.

Now you will tell me whether the *Columbine* was solely to blame, or whether any blame attaches to the *Undaunted*.

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CAPTAIN REES.—We think the *Columbine* was to blame.

The Columbine.

DR. LUSHINGTON.—I pronounce for the damage.

Proctors:—*F. Clarkson*, for the *Undaunted*; *Toller*, for the *Columbine*.

THE “*LOUISA*.”—*Motion*.—In this case, the *Louisa*, a French galliot, bound from Cronstadt to a port in France, having suffered severely in a collision with a Swedish brig, bound to Marseilles, in the North Sea, on the 31st of October, was abandoned by the master and crew; and being descried next day by three fishing-vessels, with twenty-four hands, employed in their usual occupation, they boarded her, and in five days brought her safely to London. The value of the ship and cargo was £4,000, and the Court, in Michaelmas Term last, awarded £1,200 to the salvors of the derelict. A part of the crew of the smacks were apprentices, who were minors, and incapable of giving a legal consent. The Proctor for the salvors now moved the Court to apportion the salvage, a schedule of division by the agent having been submitted to the Court.

Salvage.—
Apportion-
ment.—Shares
to which own-
ers are entitled.

DEC. 20.

DR. LUSHINGTON.—An affidavit has been produced in this case, to which I must advert before I give my opinion on the question I have to determine. The affidavit is made by Mr. Samuel Hewett, of Barking, smack-owner and agent, and he says, he has acted as agent for the masters, owners, and crews of the three smacks, and is the attorney authorized by them to receive the amount of the salvage awarded to be due to them for the services rendered to the *Louisa*, for their use and benefit, “and that, in the apportionment made of the salvage-money, the sum of £2 has been paid to each of the mates of the three smacks, and one per cent. to each of the seamen belonging thereto, in addition to the shares agreed by the Articles to be received by them respectively, and that the shares which have been apportioned to the apprentices who were on board the three smacks at the period of the services is considerably larger than they

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The Louisa.

would be entitled to receive under the Articles, and that the apprentices have actually been paid by this deponent, on account of their respective shares, which have been apportioned between them according to their respective merits, the sums mentioned in the annexed schedule,* which said sums deponent verily believes it will be impossible to recover from the said apprentices."

The Court
not bound by
previous ar-
rangements.

Now the first question the Court has to look at, with reference to this affidavit, is this:—Am I to be bound by the Articles which it is stated the masters, mates, and crews have entered into with the owners? If it is to be contended that the jurisdiction of the Court is legally excluded by the Articles, the proceeding ought to have been of a different kind; the Articles ought to have been brought in, and it should have been alleged that I have no discretion to exercise, but am bound by them. But until I find myself compelled by high authority, I will not consider any Articles previously entered into as binding upon my judgment. It would be repugnant to general principles to do so, and prejudicial to public interests, by taking away from actual salvors the motives to spirit and energy. I now read the scale of apportionment. The net sum to be divided (after deductions) is £1,098, amongst the owners, masters, and crews of the three smacks; that is, 300 shares of £3. 13s. each, out of which there are apportioned to the owners of the three vessels, 70 shares each, or £766. 12s. out of £1,098; to the three masters, 10 shares each, £109. 16s.; to the three mates, 5 shares each, £54. 18s.; to the five seamen, 5 shares each, £91. 10s.; and to the thirteen apprentices, 1½ share each, £71. 4s. Now the question is, whether, looking at past precedents, and to the particular circumstances of this case, I could, without disregarding all that my predecessors have done, affirm this arrangement. I believe this arrangement to be not only without precedent, but utterly contrary to all

* The schedule contained the names of thirteen apprentices belonging to the smacks *Upton*, *Happy Return*, and *John and Emma*, amongst which the sum of £27 was apportioned in the following manner:—One, £4; three, £3; one, £2. 10s.; two, £2; three, £1. 10s.; and three, £1.

precedent ; that it is in violation of all rule and principle, and in direct repugnancy to every thing which has been said or done by every one of my predecessors. The very utmost amount which I find has at any time been decreed to owners is a moiety ; whereas, in the present case, they take 210 shares out of 300. Now this was not the case of a steamer, in which the salvage was performed principally by the vessel itself, which makes a very wide distinction from ordinary cases of salvage : I am aware that an apportionment of salvage by a steamer must be on a different principle. Now let us see what was done by Sir John Nicholl, in one of his last judgments. In the case of the "*Albion*,"* he made an apportionment under circumstances in many respects resembling the present ; that is, the vessel entitled to share was a vessel engaged in the occupation of fishing, and he allotted no more than seven-twentieths to the owners, and he went further, and said, if it could be agreed upon by Counsel, he would be ready to establish that arrangement as a rule of Court. I am extremely doubtful, looking at the varying circumstances of these cases, whether it be practicable to establish any rule of Court upon the subject ; for I am bound to look at all the circumstances, and apportion the salvage accordingly. Where the efficiency of the vessel is a cause of effecting the salvage, and where there is a great risk of the property of the owners, I should allot a greater proportion to them. In this case, I see nothing to take it out of the ordinary and general principle, whereby salvage is divided amongst the owners of the ship and the crew, except that the vessel was engaged in fishing. I take that circumstance into consideration, and I am of opinion now, as on a former occasion, when I apportioned the salvage in the case of the "*Deveron*,"† that the owners of fishing-vessels are entitled to a more liberal allotment than other vessels, first, because their occupation was interrupted, and secondly, because the expense of navigating them is larger than in ordinary cases, so far as regards the wages of the mariners. In that case, £1,600 was allotted, and I gave the owners 700, that is, seven parts out of sixteen. I shall adopt the

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The Louisa.

* 3 Hagg. A. R. 254.

† 10 M. Law Mag., 219.

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same rule in this case as in the case of the "*Deveron*," with regard to the owners, and instead of £768. 12s., I shall reduce the amount to £480. 7s. 6d. With regard to the proportions of the masters, mates, seamen, and apprentices, I do not want to disturb an arrangement with which they seem to be satisfied. The sums will be these: to the owners £480. 7s. 6d.; to the three masters, £205. 17s. 6d.; to the three mates, £102. 18s. 9d.; to the five seamen, £171. 11s. 3d.; and to the thirteen apprentices, £137. 5s.: total, £1,098. I shall only allow the money to be paid out according to this scale of distribution, and I cannot allow any of it to be paid out without a fresh Power of Attorney.

Fielder, Proctor.

Prerogative Court of Canterbury.

FEBRUARY 13.

A will not duly attested; a further writing, denominated a codicil, duly attested; admitted to probate, not as a will and codicil, but as parts of one continuous will.

IN THE GOODS OF WILLIAM TEMPLE GOURAND SCRIVEN, DEC.—*Motion, ex-parte.*—The deceased, a lieutenant in the service of the East-India Company, died on the 20th December last, leaving a widow and children. His effects consisted of about £60 in this country and 500 rupees at Bombay. On the 18th October, the deceased, being then confined to his bed by the illness of which he died, delivered the will, signed at the end, to Mr. G. H., the executor named therein, requesting him to witness the will with Captain N., a friend of the deceased, who was on a visit to G. H., but who was not present on the occasion. G. H., accordingly, took the will home with him, and on the following day (October 19th), with Captain N., attested and subscribed the same, in the presence of each other, but not in the presence of the deceased, to whom G. H. on the same day, forwarded the will by post. On the 23rd of November, the deceased, in conversation with G. H. respecting his affairs, and with reference to his will which he had before him, in reply to a suggestion of G. H., said he was not disposed to alter his will; but, shortly after.

same day, the deceased, upon G. H. return-
 ve of him, having left him for a short time,
 he had determined to leave his mother £200,
 with his own hand, wrote on the second side
 paper on which the will is written, a codicil,
 executed in the presence of G. H. and Mrs.
 and subscribed the same in his presence,
 deposed that the deceased, on executing the
 at and referred to the will, and said that it
 and that the codicil was a codicil thereto,
 not republish or acknowledge his signature
 ess terms.

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Scriven, dec.

D., moved, on affidavit of these facts, for *MOTION*.
 ministration, with will and codicil annexed, to
 the widow (the executor having renounced),
 gatee.

JER FUST. — The will purports, in the attes- *DECREE.*
 to have been signed by the deceased in the
 ne subscribed witnesses, and that they at-
 te in the presence of the deceased and of
 apparently, on the face of the paper, it is a
 instrument ; but it turns out, from the affi-
 of these persons did not see the testator at all,
 signed it afterwards. Under these circum-
 per, *per se*, is invalid under the Act. But
 he afterwards wrote that which is denomi-
 . I do not know whether the word "codicil"
 vriting or not ; I suppose it is ; and that co-
 o have been executed on the 23rd November
 rs that the testator executed that paper in the
 o witnesses ; therefore, it was duly executed.
 it upon the same sheet of paper (though on
 as the will itself. Now, at present, I do not
 Court has held that a codicil executed in the
 tnesses has given validity to a paper, with-
 g reference therein to that paper. It is not,
 blication—but a publication. The difficulty
 at to do with this case, in which the property
 f the property were not so small, I should

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Scriven dec.

Probate of the
will, not of will
and codicil.

have no hesitation in directing the paper to be propounded; but I think it may be considered in another way. As the will is signed by the deceased, but not duly attested by witnesses, this other writing may be considered, from the manner in which he expresses himself—"I do now further desire"—as a continuation of the will; and I pronounce for that writing, with the other, as a continuation of the will of the deceased—that is, I do not decree probate of the will and codicil to pass, but probate of the will to pass—that will being contained on the first and second sides of the paper—considering this as a continuation of the will, rather than a codicil to it. Had the property been larger,—there being but £60 here and £850 in the East Indies,—I should have directed the paper to be propounded; but upon *ex-parte* motion, which binds nobody, the Court may permit it to pass in the form I have stated. Of course, the names of the witnesses on the first paper do not go out.

Fielder, Proctor.

Execution of
two powers, re-
lating to differ-
ent property,
one requiring
execution in
presence of two
witnesses, the
other not re-
quiring such ex-
ecution.

IN THE GOODS OF SARAH MATILDA BOSWELL, *Widow*
DEC.—*Motion, ex-parte.*—The deceased died on the 9th Jan. 1843, leaving F. J. Y., her sister, only next of kin. By marriage settlement, the sum of £43 per annum, Long Annuities, standing in the name of the deceased, and also furniture, plate, and other effects; also jewels, trinkets, and wearing apparel (being the only property of which the deceased died possessed, besides £2 Long Annuities, purchased by the sale of part of the plate and jewellery, and cash), were assigned upon trust; as to the stock, furniture, and effects, after the death of the survivor of the deceased and her husband, as the deceased by will, executed in presence of two witnesses, might, notwithstanding coverture, direct or appoint; and as to the jewels, trinkets, and wearing apparel she might become possessed of, during coverture, upon trust for the sole use of the deceased, to permit her to sell them in her life, or to dispose of by will or otherwise after her death, notwithstanding coverture. Her husband died 16th August, 1837. *Daily*

, the deceased, in pursuance of the power vested in her will on the 29th August, 1836, in conformity with the power, appointing the £43 Long Annuities and her residue. In the will are two or three trifling alterations, the first there is an addition, without date or signature, of a watch, some spoons, and also the wearing apparel there is also a codicil on a separate paper, dated 20th May, 1837, signed and attested by one witness, which directs to bequeath the £43, given by the will to the deceased's sister, to her executor and his daughter. The whole testamentary papers are in the handwriting of the deceased, and the only information that could be obtained in relation to the alterations in, and addition to, the will was furnished by C. J. P., one of the executors, who stated that, the day before the deceased's death, she requested him to bring her will from her iron chest, which was kept locked in her bedroom, and look it over for her; that he accordingly brought the will, which was then sealed up in an envelope, out of the chest, and opening the envelope, found the papers, which he carefully perused, and which are now in the plight in which they then were in; that the deceased, on his showing the papers, inquired if it (the will) would do, and in informing her that it ought to have been executed in the regular way, expressed her regret thereat, and said, if she was spared, she would do so; that he re-sealed the will and codicil in the envelope, and deposited the same in the chest, where he found them shortly after her death in the same state.

C. D., moved for special Letters of Administration **MOTION**.
The will (as contained in the will and addition) to be attested to the executor, upon the consent of the sister filed.

H. JENNER FUST.—Before the Statute, the co-**DECREE**.
might be considered a republication of the will. The deceased had a power to dispose of the jewels, trinkets, and wearing apparel by will, and she has sufficiently executed the addition to the will was written before 1838. I am, therefore, of opinion that, as far as the will and the addition are concerned, there is a good execution of the power.

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FEB. 13.
 Boswell, dec.

But the codicil cannot operate, as she had a power of disposing of that property by a will executed in the presence of two witnesses, and it is executed in the presence of one witness only. Administration of the will and addition may pass as they now stand, but the consent of the sister must be had, and I do not decree the administration unless the proxy of consent be exhibited. The Court has often expressed its intention not to decree probate in these cases on an undertaking—a proxy of consent must be exhibited.

Fielder, Proctor.

Administration.—A party in possession of Letters of Administration put upon proof of her title, in order to raise a question of legitimacy, determined by a diocesan Court, the sentence being alleged to be obtained by fraud and collusion. — The Allegation pleading such fraud and collusion rejected on the ground that the facts pleaded were incapable of legal proof.

MEDDOWCROFT v. HUGUENIN.—*Allegation.*—This was a cause of citing Harriet Huguenin, wife of Louis Huguenin, (formerly Meddowcroft, widow,) to bring into the Registry the Letters of Administration of the effects of William Meddowcroft, deceased, granted to her by this Court in 1837, as his lawful relict, and to shew cause why the same should not be revoked, as having been surreptitiously and under false suggestions obtained, and why Letters of Administration should not be granted, according to law, at the suit of William Meddowcroft, heretofore passing by the name of Gregory, the natural and lawful and only child of the said deceased. This party brought in an Allegation, which pleaded that the deceased (William Meddowcroft) died in November, 1835, intestate, leaving Mary Meddowcroft his lawful relict, and William Meddowcroft, heretofore passing by the name of Gregory, his natural and lawful and only child; that the deceased, on the 28th of February, 1815, lawfully intermarried with Mary Gregory, widow; that they had issue of their marriage the said William Meddowcroft (party in this cause), born in 1817, but that, in the entry of his baptism in the Registry Book of the parish of St. George the Martyr, Mary Meddowcroft, his mother, was erroneously or fraudulently described as “Mary Gregory.” This Allegation was debated in Trinity Term, 1842, its admission being opposed, on the ground that the object of the suit was to set up the party’s legitimacy, whereas the *de facto* marriage between his parents in

June 23.

815, had been pronounced null and void by the Consistory Court of London, on the 12th July, 1816,* which sentence of nullity was never appealed from, and his father, after the sentence, married another person, the party cited.

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Huguenin.

The COURT thought it better to admit the Allegation, observing that it was a most important question, if the Court, after the expiration of so many years, was to enter into an inquiry whether the sentence of nullity was well founded, the effect of which might be, not only to legitimize the party in this case, but to bastardize the children of the second marriage.

1842.

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PER CURIAM.

On the part of Mrs. Huguenin, an Allegation was brought in, which pleaded the suit of nullity by reason of the minority of the husband and the undue publication of banns, instituted by the father of the deceased, and the sentence of the Consistory Court, pronouncing the marriage null and void, from which sentence there had been no appeal. This Allegation was admitted without opposition. An Allegation on the part of Mr. Meddowcroft was then brought in, which pleaded:—

1. That he (the party) being born in 1817, and the sentence of nullity having been pronounced in 1816, it was *res inter alios acta*, and that such sentence cannot be binding and conclusive in law on him, who was necessarily a stranger to, and had no means or power of intervening in, the suit by the result of which he was and is most grievously damnified, both in estate and reputation. 2. That, by reason of the fraudulent suppression of evidence, in the proceedings, and the erroneous evidence on which the sentence was mainly founded, it was not a valid sentence, nor binding against his interests and rights, for that, previously to the publication of the banns of marriage between the deceased and Mary Gregory, in the parish church of Clerkenwell, a paper of instructions for such publication, containing the true names of the parties, viz. "William Meddowcroft, bachelor, and Mary Gregory, widow," was delivered to Elizabeth Penry, daughter of the parish clerk, who was in the habit of receiving notices for publication of banns of marriage, at the house of the clerk, and she entered such names in a private book, preparatory to the same being entered in the regular banns book, and in so doing, she wrote the initial and

* *Meddowcroft v. Gregory*, 2 Hagg. C. R. 207.

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—
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second letters "Me," of the name "Meddowcroft," so as to resemble "We," and they were so mistaken by the parish clerk, who not only, in entering the name in the banns book, mistook such letters, but also omitted the second "d," and spelt the name "Widowcroft," in consequence of which the banns were published in the name of "Widowcroft;" that, on the day of marriage, the mistakes in the banns book, which until such time were wholly unknown to the parties, were first discovered, and as they appeared to have originated (as they did) solely with Elizabeth Penry and the parish clerk, they were corrected under the directions of the officiating minister in the banns book, and thereupon the marriage was duly had and solemnized between the parties in their proper names. 3. That, at the time of the proceedings in the Consistory Court, in 1816, Elizabeth Penry, to whom the paper of instructions for the publication of the banns was delivered, was not examined as a witness, although living at the time, nor was such paper of instructions, nor the private book, produced, or any reason pleaded or assigned for their non-production, and that by such suppression and withholding of evidence, the true character of the case was concealed from the Court. 4. That, after the determination of the suit, Elizabeth Penry (who is since dead) repeatedly declared to several persons, that she was much surprised that she had not been produced or examined as a witness, and that she had no doubt that the names were correctly written upon the paper delivered to her as a notice for the publication of banns, and that the name of "Meddowcroft" was, through her mode of writing, mistaken for "Widdowcroft," and up to the period of her decease she declared that the mistake and its consequences preyed upon her mind and caused her very great uneasiness. 5. That, before and during the proceedings in the Consistory Court, Mary Meddowcroft, the wife of the deceased (and the other party in the cause) by false representations of her husband and others in respect to the advantages that would result to her from not contesting the suit, and more particularly from his solemn promise that, in the event of a sentence of nullity being pronounced, he would again marry her, and she, being entitled to a pension of £65 per annum as the widow of her former husband, a lieutenant in the Royal Navy, was induced to carry on the suit collusively, and neither to administer interrogatories to the witnesses, nor to file any Allegation (he having so declared during and after the proceedings); that, in consequence, there was no *bona fide* contestation of suit, and by reason thereof the true state of the facts was perverted or suppressed, and a surprise effected by the promoter of the

suit upon the justice of the Court. 6. That the great uncle of William Meddowcroft, party in this cause, by his will gave and devised to trustees the residue of his freehold and personal estate for accumulation during the period of 21 years, after which, upon trust to convey the same to the use of the eldest male lineal descendant then living of his nephew, William Meddowcroft, the father of the party in this cause, which period expired in July, 1842, and the property had accumulated to the value of £80,000. 7. That the party was not fully apprized of the circumstance of the marriage of his parents until the close of the year 1840, when his mother, for the first time, shewed him certain documents connected with the proceedings in the Consistory Court, and made sundry communications relative thereto, which induced him to institute the present proceedings. 8. That diligent search and inquiry had been made for the paper of instructions for the publication of the banns, and for the private book of banns (which were in existence at the time of the proceedings in the Consistory Court), but they cannot now be discovered.

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The admission of this Allegation was opposed.

Addams, D., in opposition to the Allegation.—This plea is insufficient in law and in fact. It sets up, as a position of law, that the sentence of nullity was *res inter alios acta*. *Phillipps** lays it down that a sentence of the Ecclesiastical Court, on a question touching the validity of a marriage, is received as conclusive evidence on a question of legitimacy by the Temporal Courts: "in all these cases," said C. J. De Grey,† "the parties to the suit, or at least the parties against whom the evidence was received, were parties to the sentence, and had acquiesced under it, or claimed under those who were parties, and who had acquiesced." This party claims under his father and mother, and the sentence is conclusive against him. It may be said, in case of fraud, any judicial act may be reversed; but if the party is entitled to be heard on this ground, he must go to the Consistory Court. So much as to the law: then as to the facts. It is no matter how the undue publication of the banns happened; the fact was so; the banns were, in fact, published in a wrong name, and the alteration of the name before the

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* *On Ev.*, b. 1, c. 3, s. 1.

† *Duchess of Kingston's Case*, 11 St. Tr. 261.

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solemnization of the marriage did not make the publication of the banns legal.

Robinson, D., on the same side.—The object is to introduce, in 1842, a collateral issue, respecting a sentence of the Consistory Court in 1816, and to call upon a Court of Probate to exercise incidentally a sort of appellate jurisdiction over the Consistory Court of London, in a matrimonial cause. The following positions or principles are to be found in the books :—1. In all civil suits, the sentence of a competent Court of Exclusive Jurisdiction, directly pronounced *in rem*, is binding and conclusive on all other Courts, whilst the sentence remains unreversed. 2. If fraud has been practised in procuring the sentence of the Court, the investigation of that fraud must be made in the Court where the fraud is alleged to have been committed. *Jam v. Bow*.^{*} *Kenn's Case*.[†] *Noel v. Wells*.[‡] *Hayfield v. Hatfield*.[§] *Duchess of Kingston's Case*.

Phillimore, D., in support of the Allegation.—It is said that the sentence of the Consistory Court, being the sentence of a competent Court, is binding till reversed. But *Phillipps*|| says: "Judgments and sentences of Courts of Justice, or any other judicial act, may be impeached by evidence of fraud or collusion, and such evidence was adjudged to be admissible, on the part of the prosecution, in the case of the Duchess of Kingston. A distinction in this respect has been made between the case of a stranger (who cannot come in and reverse the judgment, and therefore of necessity he must be permitted to aver that it was fraudulent), and the case of a party to the proceedings." How could my party go to the Consistory Court? He has no *persona standi* there. If we allege fraud and collusion, this is the proper and the only Court to shew it. In the Duchess of Kingston's case, all the learning was exhausted, and the conclusion was that, in civil cases, a stranger is admitted in one Court to prove that a sentence in another Court was

* Carth. 225.

† 1 Lev. 235. S. C. 1 I.d. Raym. 262.

|| *Ut sup.*

† 7 Rep. 42.

§ 5 Bro. P. C. 100

l by fraud or collusion. *Prudham v. Phillips*,* FEB. 13.
ord v. Edwards.† Though Elizabeth Penry is dead, *Meddowcroft v.*
 f her declarations may be received. In *Higham v. Huguenin*.
 y,‡ the declaration of a man-midwife was admitted
 e the birth of a child. Where a person had peculiar
 f knowledge, and was without bias or temptation,
 e of his declarations as to facts may be received
 e death.§

Phillimore, D., on the same side.—If the Temporal
 have power to decide incidentally questions belong-
 the Spiritual Courts, this Court has an analogous
 to decide questions which belong to the Diocesan

There is an exception to the rule that the judg-
 f a Court of competent authority *in rem* is binding
 he world, in respect to bastardy.|| [Further autho-
 ited:—Smith's *Leading Cases*;¶ Hargrave's *Law*
 ;** the *Yarker Peerage*.††

H. JENNER FUST.—I am not prepared, in the state in JUDGMENT.
 the Allegation is, generally, to determine this question,
 s not brought before the Court in a shape in which,
 re to admit the Allegation, it would enable me to
 it: so that it must be understood, that the observations
 are simply with reference to the mode of pleading,
 to the question which the Allegation is meant to

y case of nullity pronounced in these Courts may be
 up in the same manner, and the Court may be called
 inquire into the validity of such marriages; the pro-
 gs, therefore, should be perfectly regular, and the
 ould be established by formal proof. Now how is
 uted to establish that an erroneous entry of the name
 ade in the book but by parol evidence of the entry?
 at parol evidence? By the declarations of a party de-
 . It is not pleaded that anybody saw the paper of in-
 ons but Elizabeth Penry. I am decidedly of opinion

ibl. 753. † 2 Ves. 243. ‡ 10 East, 120.
 Stark. 44 (ed. 1842). || 2 Stark. "Bastardy."
 Vol. 183. ** P. 480. †† Le March. 354.

FEB. 13. that her declarations cannot be received. If the declarations of such a party could be received in such cases, they might go to bastardize the issue of a whole parish. I therefore reject the fourth article. The fifth article goes to shew that there was no *bonâ fide* contestation of suit. Who is to prove the facts? I presume that Mrs. Mary Meddowcroft is to establish by her evidence her own marriage, for her own interest; and, having for the last twenty-five years been receiving a pension as the widow of a lieutenant in the navy, she is now to come forward and say, "All I have sworn is false, and I am not the widow of a lieutenant in the navy." I am of opinion that the fifth article is not admissible, or the effect of her evidence would be to establish her own marriage with the deceased, and she would be deposing for her own interest.

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Allegation to be reformed. I direct the Allegation to be reformed, by striking out the fourth and fifth articles, and by the party's pleading proper evidence of the facts to be established, upon which the Court is to give its opinion upon the whole question of law.

On the part of Mr. Meddowcroft, an alteration was made in the fifth article, by pleading that "she (Mrs. Mary Meddowcroft), as well during the said proceedings as shortly after the termination of the same, so declared to divers persons;" and two articles (sixth and tenth) were added to the Allegation, pleading as follows:

Additional Articles. That, during the proceedings in the Consistory Court, and for some days subsequently to their termination, the deceased and Mary Meddowcroft continued to cohabit together as husband and wife, when the latter, suspecting, as she at that time declared, that the deceased did not intend to perform his promise of again marrying her, had recourse to professional advice as to the expediency of an appeal from the sentence of the Consistory Court; but, being informed that no fresh facts or other evidence could be introduced in an Appellate Court, and being otherwise dissuaded, she returned to cohabitation with the deceased, in the hope, as she repeatedly declared, of being able to induce him still to fulfil his promise of again marrying her, and continued to cohabit with him till the birth of their child, the party in the cause.

The whole proceedings in the Consistory Court in the case of *Meddowcroft v. Gregory* were annexed. FEB. 13.

The admission of this Allegation, as reformed, was opened. *Meddowcroft v. Huguenin.*

Addams, D.—The case comes before us now in a somewhat different shape, with reference to the note, which has been furnished by the Court, of that of *Millicent v. Fisher*,* 1843.
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MILLCENT v. MILLCENT.—A case extracted from Minutes and Acts Court.

John Millicent married Alice Fisher, in the parish church of St. 1678.
Duke's Place, London, by whom he had a son, William Millicent. June 4.
t. Said John commenced a suit of jactitation of marriage before Sir 1680.
m. Exton, Chancellor of London, against the said Alice, by the name Alice Fisher, of the parish of St. Giles in the Fields, in the county Middlesex, although at that time she resided in the county of Northampton; and continued so to do for several years afterwards.

John said to be returned, and Alice said also to appear by her May 9.
Proctor, who was assigned to exhibit a special proxy, under her hand and seal next Court. John's Proctor gave a Libel of Jactitation, May 15.
which was admitted, and Alice's supposed Proctor gave a negative issue, an Allegation in writing, consisting of two Articles only. 1st, sets forth, that they, being *liberi et immunes ab omni contractu matrimoniali sponsalitico*, did A.D. 1678 *tractare de matrimonio inter se habendo*, that they procured such marriage to be solemnized, *mensium uno aliquo anni 1678, in quiddam ecclesiâ in vel propè civitatem Londinæ*; did not lay consummation, cohabitation, or procreation of children, when, where, or by whom married. There are no answers given on account to this Allegation. N.B. When this Allegation was admitted, the minister who married them, and Ingleby Daniel, Esq., who gave in marriage, and Dorothy, his wife, who were the only witnesses present at the marriage, were all of them living—but none of them examined.

Three witnesses, who were examined to the *factum* of the marriage, June 19.
were produced and examined, and, that day, publication passed, *habituations*, and the cause afterwards called on for sentence: the whole of this cause was not above six court-days. Sentence given, whereby July 12.
John was pronounced *defecisse in probatione*, and John pronounced to *liberum et immunum ab omni contractu matrimoniali vel sponsalitico* with said Alice, and she condemned in costs, which costs were never paid. N.B. The original citation, proxy, and sentence are not to be taken with.

When the said John continuing to absent himself from the said Alice, and 1687.
being within the diocese of Ely, she obtained Letters of Request to the said

Feb. 13. from the *Repertorium* of Sir Edward Simpson and the notes of Dr. Andrews. But that case, which was a jactitation suit, not a *Meddowncroft v. Huguenin*. sentence *in rem*, does not help the present, nor does it mili-

Nov. 3. said Sir Thos. Exton, then Dean of the Arches, and cited him to answer to her in a cause of Restitution of Conjugal Rights. Citation was returned, and Mr. Hill, who was Proctor for said John in the Cause of Jactitation, appeared as Proctor for him. A Libel was given, in writing, pleading the marriage, which was prayed to be admitted. Hill, in reply, alleged that his client had, in 1680, instituted a suit of Jactitation of Marriage against the said Alice, in the Consistory Court of London, and that she, in justification of herself, had pleaded her marriage, and examined several witnesses, but had failed in her proof, and that sentence had been given against her, and exhibited an exemplification of the said sentence and prayed to be dismissed. Upon which, the Judge assigned to hear his pleasure, on the prayer of both Proctors, the next Court-day. Sir Thos. Exton, on hearing Counsel, rejected the Libel, and dismissed John Millicent. *N.B.* The Libel is not to be found; very probably, this Libel set forth the fraud that was used in obtaining the sentence in the Jactitation Cause.

Upon this ill-success, William, the son, being then a minor, of nine years of age, chose Anthony Buckworth his guardian, and he, being no party to the Cause of Jactitation, could not be bound by that sentence, and thereupon, by his guardian, appealed therefrom to the said Sir Thos. Exton, and in his appeal specifies the day of the marriage, alleges the consummation, cohabitation, and his birth, and suggested that, being no party to that sentence, he could not be bound thereby. His Proctor exhibited his said appeal, and prayed it to be admitted. Hill appeared for J. Millicent, and alleged and prayed as he had done 12th Nov. preceding. Thereupon, the Judge assigned to hear his pleasure, on the petition of both parties, and decreed a Monition against the Registrar of London to transmit all the proceedings in the Cause of Jactitation the court-day following. The Judge, on hearing Counsel, admitted the Appeal, from which Hill appealed to the Delegates. The minor's Proctor gave an Allegation in writing, pleading the marriage, consummation, birth and christening of William. The Judge assigned to hear his pleasure on the admission thereof the Friday following; but was on that day stopped by Mr. Hill's producing a Commission of Appeal under the Broad Seal.

1688. Libel of Appeal is given, admitted, and a negative issue, and the cause was assigned for sentence at Serjeants' Inn, information being first had at the Commons. Mr. Buckworth, the guardian, dying, the cause was never heard. *N.B.* That the process *Judicis a quo*, from the Arche to the Delegates, is not to be found, though Mr. Hill's receipt stand for the same.

te against the principle I have laid down, that if the party Feb. 13.
ishes to set aside the sentence, he must have recourse to Meddowcroft v.
e Court where the sentence was pronounced, or a Court of Huguenin.

John Millicent was clandestinely married to Dorothy Wright, in a private chapel in his own house, at Barham, in the county of Cam- July 24.
dge, his former wife, Alice, still living. He had by the said Dorothy r children. He afterwards made his will, and thereof appointed the resaid Dorothy and others his executors, and thereby gave part of estate to the said Dorothy and the remainder of his real and personal ate to trustees for the benefit of her four children.

John died and a *Caveat* was entered in the Prerogative for the interest 1716.
William, the son. The *Caveat* was warned by Mr. Hill, Proctor for June.
rothy and the other executors, when William's Proctor, in Acts of Aug.
art, alleged the said William to be the natural and lawful son of the d deceased by Alice his wife, in *matrimonio legitimo natus*, and prayed : executors' Proctor's answers thereto. He refused, alleging that the rriage which the said William would set up had been formerly liti- ed in the Consistory Court of London, between the deceased and : said Alice, his wife, William's mother, and a sentence given against in that Court; and exhibits a copy of that sentence from a copy re- uining in the Arches Office (the original not to be found), but offered admit William to be a contradictor to oppose the will. But this not rswering William's intentions, which were to have the validity of his xther's marriage and his own legitimacy determined, the Judge, on rring Counsel, ordered Hill to answer whether William was the legi- ate son of the deceased or not, which he denying, an Allegation was Dec. 3.
en, pleading deceased's courtship and marriage to Alice, cohabita- n, and birth of William, and many other circumstances, and copies of h proceedings as could be met with out of the proceedings had in : causes formerly depending between the deceased and Alice, and lliam, were exhibited. This Allegation was admitted, from which nission, the cause was appealed to the Delegates. The Judges Dele- e confirmed the Judge of the Prerogative's decree, retained the prin- al cause, and condemned Hill's client in £70 costs.

After this, there were several Allegations given and admitted on both 1718.
es. This cause was heard by the Judges Delegate, who being divided in Feb. 18.
nion (the Civilians being of opinion that the marriage was proved, the stices Price and Eyre thinking otherwise), no sentence was ever given. This case of *Millicent v. Fisher* was cited in the case of *Thompson v. rdo* by his *Guardian*, Prerog. 4th Sess. Mich. T. Nov. 22, 1737, in port of an objection to examine the mother in support of her son's itimacy. The Court said, "She has a plain interest to support her 's legitimacy, for that will establish her marriage;" and so rejected ith's Petition, which was, that she might be examined as a witness. rertorium, 4 vol. 363.

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cognate jurisdiction. But, waiving this objection, and assuming that every syllable of the Allegation could be proved, is it possible that the Court could come to the conclusion, that the sentence was obtained by fraud and collusion, and that the second marriage was bad, and the issue illegitimate? What is the result of the proceedings in the Consistory Court of London? Why, that every fact here pleaded was in evidence before that Court, which, with all the facts before it, pronounced a sentence of nullity. Then what purpose can it answer to admit this Allegation? It is pleaded that the private book was not produced in the Consistory Court; but Penry, the parish clerk, produced both the private book and the banns book at the time of his examination. It is clear that Mrs. Meddowcroft cannot be examined on this Allegation, because she has an interest; but there is an attempt made to introduce her declarations.

Robinson, D., on the same side.

Phillimore, D., *contrà*.—The case of *Millicent v. Fisher* shews that the Court can entertain such a case as this, and as the party in this case was not born when the proceedings took place in the Consistory Court, he is entitled to have the case investigated. His interests have been sacrificed, as he alleges, by fraud and collusion, and this is the proper *forum* to establish his rights.

R. Phillimore, D., on the same side.

JUDGMENT.

SIR H. JENNER FUST.—I am unwilling to detain this case any longer, being of opinion that, if all the facts could be proved by evidence, they would not be sufficient to induce me to revoke the Administration which has been granted to Mrs. Huguenin.

Now, without giving any opinion at present whether or not the party is bound by the sentence of nullity pronounced in the Consistory Court, in 1816, or is at liberty to plead that it was *res inter alios acta*, I will proceed, in the first instance, to consider whether, admitting he can so plead, the circumstances pleaded are sufficient to establish the fact of fraud and collusion in obtaining the sentence.

The articles.

I pass over the first article; the second pleads the circumstances which occurred respecting the banns, and concludes:

hereupon the said marriage was then duly had and
 sed between the said William Meddowcroft and
 eddowcroft, then Gregory, in pursuance of the pub-
 of such banns." How the marriage could have been
 annized between William Meddowcroft and Mary
 ; when the banns had been published between Wil-
 ddowcroft and Mary Gregory, was the question to
 led by Lord Stowell.

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third article pleads that Elizabeth Penry was not
 d in the Consistory Court, nor was the paper of
 ons or the private book produced, and it is pleaded
 paper of instructions, as well as the private book of
 s lost, and, therefore, the Court cannot have the
 of that evidence. On what evidence, then, is the
 rely for the establishment of these facts, that an
 as made in the private book in the right name of
 wdcroft," and that it was mistaken for "Widdow-

Why, I presume, from what passed at the mar-
 hen the minister corrected the banns book. But
 not prove the fact. Penry, the parish clerk, was
 of age at the time; he is not probably in exist-
 w, and I want to know how all this is to be esta-
 by evidence, independently of the declarations to
 shall presently advert. It is stated in the third
 hat the private book of banns was not produced be-
 Consistory Court; but it was in the possession of
 the time of his examination, and he states* that he
 to it at the time, and to the public banns book;
 ; he had the books before him; so that this is incor-

h Penry, the parish clerk of Clerkenwell, in his deposition in
 tory Court (4th July, 1816), stated, "On the deponent now
 o his said private book," &c., "he finds an entry therein in
 riting of his daughter, under date of the 12th February, 1815,
 ions for banns of marriage to be published between 'William
 oft, a bachelor, and Mary Gregory, a widow,' so that when
 and descriptions of the said two persons which were to be pub-
 e copied by him in the banns book, he finds, on referring to
 which he hath now also brought with him for that purpose,
 ered the same in the said banns book, in the words follow-
 liam Widdowcroft, br., and Mary Gregory, widow.' "

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rectly stated in the article. It is not possible now to produce the paper of instructions, and the Court cannot get any information as to how the mistake arose of "Widdowcroft" for "Meddowcroft."

The fourth article, pleading the declarations of Elizabeth Penry, was rejected by the Court. The fifth article now pleads the motives which induced the mother of the party to carry on the suit collusively, and that, in consequence, there was no *bond fide* contestation of suit, and a surprise was effected by the promoter upon the justice of the Court. Now there is no evidence of these proceedings, unless it be the description of the suit contained in the tenth (new) article, namely, that it was a proceeding by the minor, acting by his guardian; but it was a proceeding by the father of the party to establish his own rights, his son being under age. There was no collusion between the father and Mrs. Meddowcroft. The deceased was not the promoter of the suit; his father was the party in the suit, and therefore the averment, that it was "a surprise effected by the promoter of the suit upon the justice of the Court," is a mistake or misapprehension of the nature of the suit, as appears from the papers, which have been looked up. Can the conduct of Mrs. Mary Meddowcroft, supposing it to have been collusive, affect the sentence between the father and herself? I say nothing, at present, of the effect of these facts to shew that the suit was collusive; I am considering merely the admissibility of her declarations, as evidence of the fact averred, that she colluded with her husband. The Court would be of opinion, without the benefit it has received from the case of *Millicent v. Fisher*, that the mother's evidence could not be received, for this reason: the mother, if she established her son's case by her evidence, will be establishing her own marriage; and if she succeed in doing so, she is the widow, and not Mrs. Huguenin, and the Court must revoke the administration granted to the latter. I am not aware of any case or principle by which I am entitled to receive the evidence of a person under these circumstances; and the Court having rejected the (former) fifth article, they have now substituted the mere declaration of the same party, instead of her evidence on oath: therefore, I am to give credit to what is *declared*, and

that is sworn. [*Phillimore*. Declared *recenti* FEB. 13.
 well during the said proceedings as shortly *Meddowcroft v.*
 ination of the same," she declared so and so. *Huguenin*.
 opinion, that no declaration of Mrs. Meddow-
 admitted for any such purpose: how could I
 declaration of such a party, that the sentence
 by collusion? I am of opinion that the
 must be rejected—the point was determined
Fisher, that the mother could not establish
 imacy without establishing her own marriage.
 article, as it stands now, pleads that, during
 gs in the Consistory Court, and subsequently
 ination, the parties continued to cohabit as
 wife: this is to prove collusion. I am of opi-
 article could furnish no evidence in the cause,
 its full extent.

h article, respecting the will of the uncle, has
 o with the case at all, except to shew the
 party has. The eighth pleads that the party
 apprized of the circumstances till 1840. Now
 re there of proving these points, except by the
 he mother, who cannot be examined? The
 pleads that the paper of instructions and pri-
 banns are lost; and the tenth exhibits an office
 roceedings in the Consistory Court of London,
 is set forth as a proceeding by the party acting
 an, which is a mistake. These are all the cir-
 leaded to shew collusion. Now I have already
 great part of the Allegation consists of mat-
 g which there can be no evidence, and I want
 t are the circumstances from which the Court
 collusion? If Elizabeth Penry, who took the
 could be examined, how could she prove collu-
 ould prove that she took the proper instructions,
 e name "*Meddowcroft*;" that is the full extent
 : evidence could go. But what is the fact?
 re published in the name of "*Widowcroft*,"—
 oublet of that. It was stated in argument, on a
 ion, that I am not called upon to reverse the

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sentence of Lord Stowell, but to pronounce the sentence which Lord Stowell would have pronounced if he had been in possession of the facts. But if Lord Stowell had been in possession of the fact, that Elizabeth Penry received instructions for the banns in the name of "Meddowcroft" and that the name was wrongly spelt in the banns book, by mistaking "Meddowcroft" for "Widdowcroft," would that have altered his opinion?" Then what is there to enable this Court to pronounce that the sentence was obtained by collusion? What evidence is offered to the Court? Nothing but the non-production of a witness and the paper of instructions which is now lost; and neither Elizabeth Penry nor her father is in existence now. The case might have been different if the mother could be examined on the subject of the instructions; but she cannot give evidence in the cause, and there is nothing upon which the Court can pronounce that the sentence was obtained by collusion.

Allegation insufficient.

Supposing, therefore, that the party in this case is at liberty to shew collusion between the parties to the suit in the Consistory Court (in the case of *Millicent v. Millicent*, the son was admitted a contradictor to oppose the will, and to have an answer to his interest), I am clearly of opinion, that there is nothing pleaded in the Allegation which will have the effect of shewing collusion and fraud; and supposing that the evidence could not be impeached, and the evidence of the mother could be received, I cannot say that my sentence would be different from Lord Stowell's, and I cannot reverse that sentence except on proof that it was procured by a fraud on the Court, especially after it has remained for so many years unimpeached in any way; and although it may be a hardship on the party proceeding in this case, who could not be a party to that suit, he is bound by the sentence, otherwise we might go on *ad infinitum*, and there is no reason why grandchildren and great grandchildren may not question a sentence, on the ground that they were not parties to it. Where is it to stop?

Rejected.

I am of opinion, on the whole Allegation, that if all the facts were proved, they would not be sufficient to est-

blish the fact, that the sentence of the Consistory Court was obtained by fraud and collusion, and that the party is the issue of a legal marriage. I must reject the Allegation, on the ground that there is no collusion shewn, and that the facts are not sufficient to enable the Court to pronounce that a party is entitled to Administration in preference to Mrs. Huguenin.

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Huguenin.

Proctors: *Loveday*, for the party proceeding; *Toller*, for the party cited.

BURGESS v. MARRIOTT.—*Act on Petition.*—John Owen, Inventory and of the City of London, died 27th July, 1815, having made Account. — A will and a codicil thereto, appointing Elizabeth Phipps, widow, Thomas Marriott, and William Moore Elliott, executors, who proved the same in this Court in August, 1815. The executors, considering that the testator had made no disposition of the residue of his property, divided the same amongst themselves, save £1,000. In November, 1842, a Citation issued and was served upon Mr. Marriott, as the surviving executor, calling upon him to exhibit an Inventory and Account, and to see portions allotted and distribution made, according to the Act, at the instance of William Burgess, the son and administrator of Sarah Burgess, widow, deceased, one of the sisters and next of kin of the testator, and, as such, one of the parties entitled to the residue of his estate and effects undisposed of by the will. An appearance was given on behalf of Mr. Marriott under protest, alleging that the testator by his will gave to Mrs. Phipps (one of his executors) £2,000 for life, and at her death, one moiety thereof to her daughter, Elizabeth Phipps, jun., and the will then proceeds: "and the remaining thousand pounds to be disposed of as I shall hereafter mention;" but it makes no further mention of that £1,000, and contains no bequest of or direction in respect to the residue; that Messrs. Marriott and Elliott, the other executors, have no legacy, and they are entitled, as nude executors, to the residue, and to the £1,000 as part of it; consequently that Mr. Burgess, having no interest in such residue, had no right to call upon

Inventory and Account. — A nude executor, claiming to take the undisposed of residue, cited to exhibit on I. and A., and to see portions allotted, appears under protest; the protest overruled, and assets admitted. — These Courts must necessarily, in such questions, consider the construction of the will.

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 —
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the surviving executor for an Inventory and Account. In the Act on Petition it was further alleged, on behalf of Mr. Marriott, that Elizabeth Phipps, jun. (named in the will), survived the testator, but predeceased her mother, and that the moiety of the £2,000, in which she, whilst living, had a vested interest, became the property of her representatives absolutely. On the part of Mr. Burgess, it was denied that the £1,000 (the other moiety of the £2,000), by the construction of the will, became divisible amongst the executor or their representatives, inasmuch as, by reason of the testator not having carried into effect the intention expressed in the will, of making a further disposition in respect of the said sum, the same (subject to the life-interest of Elizabeth Phipps) became the property of and divisible amongst the testator's next of kin and their personal representatives. In the Rejoinder to the Act, it was alleged that the question raised in the Reply was a question for a Court of Construction.

ARGUMENT.

Adams, D., for the party cited.—This is a pure question of construction for the Court of Chancery, and before the executors made a distribution of the residue amongst themselves, they took the opinion of Counsel, who said that, as nude executors, they were entitled to the undisposed of residue, including the £1,000, and there can be no doubt that it is so. Roper's *Law of Leg.*; * *Bland v. Lamb*.† The only exception is the case of *Davers v. Dewes*.‡ Mr. Marriott is entitled to be dismissed.

Robinson, D., for Mr. Burgess.—The question is, whether we shew a sufficient interest to entitle a party to an Inventory and Account in the first instance. By the statute§ and by the canon law, an executor is bound, *ex-officio*, to exhibit an Inventory, without application, in the Court whence probate was issued.

Adams.—The rule laid down as to the *ex-officio* duty of an executor to exhibit an Inventory is not acted upon. When it is called for, the party must shew some interest.

JUDGMENT.

SIR H. JENNER FUST.—The testator died in 1815, and

* 2 Vol. c. 24.

† 2 Jac. & Wal. 399.

‡ 3 P. Wms. 40.

§ 21 Hen. 8. c. 5, s. 4.

It was proved shortly after his death, and at this time, the surviving executor is called upon to exhibit an Inventory and Account of the property of the deceased, to the portions allotted and distribution made according to the terms of this Citation an appearance has been given under protest.

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Marriott.*

Now the protest is not to the jurisdiction of the Court, but to the right of the party to call for an Inventory of the property in the circumstances; and it is alleged that the question in the Reply, if raised at all, should have been raised by a Bill of Construction, and not by Citation in this Court.

I am of opinion that this is no ground of protest. The Court does not think it necessary to enter into the question whether or not an executor is bound, *ex-officio*, to exhibit an Inventory; for though in strict right it may be that an Inventory ought to be exhibited without calling for it, that is the practice at the present day; but a party is required to call only when called upon, and the Court has exercised a discretion whether it would call for an Inventory or not, and there has been a great lapse of time, it has not considered it necessary to do so. But in all questions of this kind these Courts must necessarily enter into the construction of the will. If I should determine that the party is not entitled to call for an Inventory, I should in effect decide that the party is not entitled to any part of the property of the deceased, and that the property belongs to the executor; therefore I am bound necessarily to enter into the question of the construction of the will, to see whether the party is entitled to call for an Inventory.

No ground
for protest.

Court must
consider the
construction of
the will.

I am of opinion, with regard to this part of the case, that the party is entitled to an absolute appearance,—that there is no ground of protest: I therefore overrule the protest upon all points. But the party has not shewn sufficient interest to call upon the executor to see portions allotted and distribution made; and, therefore, I am of opinion that the parties have lost their way, and in overruling the protest assigning the party to appear absolutely, I do not condemn that party in the costs of the protest. The course I take is, to overrule the protest, to assign the party to appear absolutely, and not to exhibit an Inventory, for if he

Protest over-
ruled.

Party to ap-
pear.

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will admit assets to cover the whole £1,000, I consider that to be sufficient. I think it is not necessary to call upon the party for an Inventory, when the question is confined to £1,000, unless all possession of assets is denied.

(An absolute appearance was immediately given for Mr. Marriott, and assets admitted to the extent of £1,000.)

Proctors:—*Toller*, for the party proceeding; *Lochner*, for the party cited.

Judicial Committee of the Privy Council.

FEBRUARY 18.

Restitution of conjugal rights. — Alimony. — Contempt. — This Committee not empowered to make an order, *proprio vigore*, for payment of alimony, till the husband obeyed its decree for restitution; such order requires confirmation by the Queen in Council.

TAYLOR v. TAYLOR.—*Appeal.—Motion.*—This was originally a suit for restitution of conjugal rights, commenced in the Consistory Court of London, by Mrs. Elizabeth Henrietta Taylor against Mr. John Donnithorne Taylor, her husband. The parties were married in 1830, and cohabited till October, 1837 (six children being the issue of the marriage), when the parties separated, the husband making the wife a liberal allowance. The following year, Mrs. Taylor brought the suit for restitution, which was met on the part of Mr. Taylor with a plea in bar, that she had withdrawn from his society without cause, and had brought a charge of adultery against him, and, well knowing it was entirely devoid of foundation, refused to retract it. The Judge of the Consistory Court rejected this Allegation, which sentence was confirmed by the Arches Court, the case being remitted. Pending the suit, Mr. Taylor was ordered to pay Mrs. Taylor £800 a year alimony, which he did for some time, and the cause having come to hearing, the Court decreed that Mr. Taylor should take his wife home, and treat her with conjugal affection. From this decree Mr. Taylor appealed to the Queen in Council, and also discontinued the payment of the £800 a year, on the ground that, the wife having obtained a decree for restitution of conjugal rights, the suit was no longer pending, and she was no longer

o alimony. The Appeal came on to be heard 10, when their Lordships affirmed the decree of the w, and subsequently (July 7) made an order that id should continue to pay his wife alimony until the decree by taking her home, &c., and decreed 1 against Mr. Taylor for payment of the arrears

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Their Lordships' order was served upon Mr. olicitor and Proctor, Mr. Taylor being abroad, out isdiction, as also subsequent Monitions issued by story Court, but no attention had been paid to 1 application was now made to their Lordships to

Mr. Taylor in contempt "in not having obeyed onitions, in order for process of sequestration to ist his estate, to enforce obedience thereto, under 2 & 3 Will. 4, c. 93, s. 2."

Dodson, Q. A., and Addams, D., contended that ARGUMENT

ships had authority to enforce their former order ncing the husband in contempt, upon which an 1 would be made to the Court of Chancery for a ntumace *capiendo* against the goods of the party. he only remedy the wife had in such a case. The 2 3 Will. 4, which abolished the old writ *de ex-to capiendo*, directed that the Ecclesiastical Court nify that the party was in contempt, and that a writ *de contumace capiendo* should issue; and 2 3 & 4 Will. 4, c. 41, constituting the Judicial 3, enacted that the Queen in Council should have owers as the Ecclesiastical Courts in such cases.

, Q. C., on the part of Mr. Taylor, thought it to their Lordships to mention all the objections h he intended to rely in the Court of Chancery. tion to their Lordships' making such an order as rayed for was, that their Lordships' former order in their own name, and by their own authority, ot an order of the Queen in Council, founded upon y their Lordships. Admitting, therefore, that the e the Queen in Council the same power as the Ec- Courts in such cases, their Lordships had no such *prio vigore*, and the former order, not having been

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confirmed by her Majesty, was irregular, and could not be enforced.

LORD BROUGHAM.—Their Lordships are of opinion that this objection is well founded. The statute gives the power to the Queen in Council, and not to their Lordships. The consequence would be, that such orders could not be made until a Council was held at Windsor or Brighton, or wherever the Court might be, when their Lordships' report might be confirmed by Her Majesty. In the present case, the defect might be remedied by obtaining her Majesty's confirmation of the former order.*

Proctors:—*F. Dyke*, for the Appellant; *Denne*, for the Respondent.

Practice.—A witness, whose incompetency, by reason of liability for costs, was not disclosed till after publication of the evidence, allowed to be released and re-examined. — Decree of the Prerogative Court of Canterbury affirmed.

CLARK v. CARTER.—*Appeal.*—*Motion.*—This was an appeal from a sentence of the Judge of the Prerogative Court of Canterbury, on a point of practice. In a testamentary cause, after publication of the evidence, it was discovered that G. S., the drawer of the will, a witness, on interrogatory, had admitted that he had retained the Proctor, and had thereby rendered himself liable for costs. The Court was thereupon moved to rescind the conclusion of the cause, in order that the witness might be released, reproduced, and re-examined. The other party objected, that the witness was known to be incompetent; that therefore no responsive Allegation had been offered, and that the Court was not at liberty to allow a witness, after the evidence has been divulged, to be released and re-examined. The Court, however, on the ground of precedents, complied with the motion for re-examination. From this order the appeal was brought.

Sir J. Dodson, Q. A., for the Appellant; *Addams*, D., for the Respondent.

JUDGMENT.

THEIR LORDSHIPS affirmed the order of the Court below.†

Proctors:—*Pulley*, for the Appellant; *Engleheart*, for the Respondent.

* The Committee consisted of Lord Brougham, Lord Campbell, Mr. Baron Parke, Mr. Justice Erskine, and Dr. Lushington.

† The Committee consisted of the same Councillors as in the preceding case.

High Court of Admiralty.

FEBRUARY 21.

THE "LOCHIEL."—*Act on Petition.*—This was a question Bottomry.—A bond, including advances made the validity of a bottomry bond, given by the master, Rotterdam, under the following circumstances:—The in England, for which a promissory note was given in England, but made payable in Holland (where the bond was given), pronounced against. a small collier, had been assigned in 1831 to Mr. Bond, now the sole mortgagee, with power of sale. In January, 1842, she was chartered at Newcastle by Mr. Bond, of that port, to proceed with a cargo of coals to Exeter, in the course of which voyage she was obliged to put into Cowes to repair. The vessel was repaired, and the coals were landed and sold, under the direction of the master at the expense of Mr. Pow; and she returned to Newcastle, where, on the 17th of May, 1842, the master gave Mr. Pow a promissory note for £139. 10s. 8d. (the amount of the sum he had expended), and Mr. Pow also advanced to the vessel £40. 19s. on account of the vessel, which was then chartered to proceed on a voyage from Newcastle to Rotterdam. A promissory note given by the master at Newcastle was made payable on demand at Rotterdam. Whilst at Rotterdam, the master was called upon by Messrs. R. and J. Dobree, of that place, to pay the amount of the note; being unable to do so, they informed him that, by the law of Holland (which is alleged to be the fact), the debt might be recorded as against the ship, which they signified their intention to do. Under this threat, and fear of being imprisoned, the master, in ignorance of its contents, as the master stated, he consented to execute the bottomry bond in question, dated the 1st of June, 1842, for the amount of £254. 12s. (covering an advance by Dobree and Co., at Rotterdam), payable three months after the ship's arrival at Newcastle (to which port she was bound), with a premium of 8 per cent. The payment of the bond was resisted by Mr. Cannon, the mortgagee. Mr. Cannon, D., for Messrs. Dobree, the bondholders.—*THE ARGUMENT.*—The bond is regular in form, and we allege that the ship was liable to seizure at Rotterdam for the debt under the promissory note. [PER CURIAM.—How came the promissory note given?]

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The Lochiel.

note to be payable at Rotterdam?] I do not know. The money was advanced *bond fide* by Mr. Pow, and expended on the ship. There is no concealment: it is stated in the bond itself how the money was advanced. There is an affidavit, that, by the Dutch law, the holder of the promissory note might sue the ship.

Haggard, D., for the mortgagee.—In its whole experience, the Court can never have been acquainted with so desperate an attempt to support a pretended bottomry bond. It is true, I appear for the mortgagee, but he represents the interest of the owner, who had assigned it to him in 1831, with power of sale. The bond itself is *felo de se*; it refers to a promissory note, which is not produced; all we know of it is, that it was made payable at Rotterdam, a most singular circumstance. The money was advanced to the master on personal credit; it was given at Newcastle, not at Rotterdam, and for repairs at Cowes. Pow was the charterer of the vessel. The bondholders must shew that the master was without credit at Rotterdam, and could not obtain money on security short of a bottomry bond. The master admits that he received £50 at Rotterdam, but says he did not require even that sum. It is for the lender to shew that reasonable precautions were taken to ascertain whether the money was required.

JUDGMENT.

DR. LUSHINGTON.—This case comes before the Court under circumstances of great singularity; and I regret to think that any additional difficulty should be interposed from the circumstances of the pleadings not being so full as the affidavits. I allude more particularly to the affidavit of Mr. William Miles, the master. But I shall endeavour, in delivering my opinion, to avoid relying upon any of the facts contained in that affidavit which ought not fairly to come within the scope of the pleading itself.

Contents of
 the bond.

The bond, which bears date 7th June, 1842, begins by stating that the vessel belongs to the port of Newcastle-upon-Tyne, and was at that moment at Rotterdam, about to undertake a voyage to Newcastle; that the brig, on a former voyage, with a cargo of coals from Newcastle, bound to Exeter, met with very rough and tempestuous weather; and

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sequence of losses and damages sustained thereby, was
 led to the necessity of putting into the port of Cowes,
 the cargo was discharged and the ship repaired;
 whereas I, the said William Miles, having no funds to
 the charge incurred thereby, did borrow the necessary
 for that purpose from James B. Pow, of Newcastle,
 tant, to the amount of £139. 10s. 8d., for which amount
 e said William Miles, signed a promissory note,
 at Newcastle-on-Tyne, 17th May, 1842, payable at
 adam on demand; and whereas, afterwards, the said
 B. Pow advanced to me, the said William Miles, in
 of the said ship *Lochiel*, a further sum of £40. 19s., in
 to supply the said ship with new sails and ropes, and
 ble her to proceed on her voyage to Rotterdam; and
 as I, the said William Miles, on my arrival at Rotter-
 was not in a position to pay the amount of the above-
 named promissory note, which, in consequence thereof,
 otested for non-payment; nor also the further amount
). 19s., advanced to me as aforesaid,"—then it states
 both these sums were paid to the said James B. Pow,
 l on account of me, the said William Miles, by Messrs.
 l J. Dobree, of Rotterdam, merchants; and the said
 l. Dobree advanced to me an additional sum of £50 to
 the port charges, and other expenses of the vessel, at
 dam, and to enable her to proceed on a voyage thence
 wcastle, where she is now bound to." It then goes on,
 ards, to hypothecate the vessel, rendering the vessel
 for a certain sum,—between £200 and £300 sterling,
 a a premium of 8 per cent.
 v, assuming the facts to be stated with precise accu-
 a this bond, the first consideration is, how far I can
 e a bond, either in whole or in part, the contents of
 are such as I have specified. With regard to the
 ssory note for the charge for repairs at Cowes, for ne-
 es furnished to the ship upon a previous voyage, in a
 a port, and the £40, it is abundantly clear, that it was
 sible for a bottomry bond to be granted in this country,
 ing the owner to have been resident at Newcastle, and
 empt was made to take a bottomry bond in this country.

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It is alleged that this money became due at Rotterdam, and having been paid by Messrs. Dobree, they had a right, by the law of Holland, to arrest and detain the vessel, and to have sold her for the purpose of discharging this debt. Be it so, for the purposes of the present consideration. I know of no case which has decided that a vessel can be duly hypothecated upon a bottomry bond for debts incurred before the voyage in question. Lord Stowell entertained considerable doubt, in the first instance, whether a vessel could be well hypothecated merely to avoid detention.* When he came subsequently to consider the question, he seemed to be of opinion that, under a certain modification of facts, it might be an additional reason for hypothecation, and that is the course which I have followed in a previous case. But Lord Stowell never said, to the best of my belief—and I never said—that a bond could be valid with respect to sums which had become due on a former voyage, and for a different purpose; and it is obvious that the effect of holding that a bond could be so given would be, that any debt contracted in England, by means of being made payable abroad, as in the present instance, would be a ground for arresting a vessel; and, contrary to the law of England, the vessel would become responsible for a personal debt. It is not necessary, perhaps, looking at the circumstances, at present, to give any very decided opinion upon the point; but it is my impression, after what is said in the bond, with regard to these sums, that I could not hold the bond to be valid.

But there is a further sum of £50, which was advanced, as alleged, for the purpose of supplying the ship with necessities, and it is possible that the bond might be valid as to this sum, though invalid for the others. This renders it necessary to look more particularly into the circumstances of this case, and to the parties.

In the first place, who are the parties before the Court? The parties are, first, Mr. Pow himself, who is the assignee of Messrs. Dobree and Co., to whom the bond was originally granted—Messrs. Dobree having failed, and the pro-

* The "*Augusta*," 1 Dod. 283.

my note having been given to him, the debt being due
 m, and the £40 incurred at Newcastle, he is the party
 proceeding to enforce the bond. Who is the other
 y? The mortgagee of the ship—the mortgagee, accord-
 to his own statement (which is uncontradicted), by
 ns of the transfer of divers mortgages in August, 1841;
 it is alleged in the Act on Petition, on behalf of Mr.
 r, that whatever might have been the origin of the title
 fr. Cannon, there was no endorsement on the register
 1 after the commencement of this suit, or till August,
 2. Now, it appears that the actual endorsement was on
 25th July, 1842; but it is sworn by Mr. Cannon that he
 on the 16th August, 1841, exhibit the several inden-
 s or bills of sale at the Custom-house, to have the par-
 ars thereof endorsed on the certificate of registry of
Lochiel, so soon as such certificate could be produced;
 t that it was not till some time after the return of the
 from a voyage to Rotterdam that his agent could ob-
 from James Brough Pow such certificate, and that the
 arer was not able previously, although he frequently
 ed to James B. Pow, to obtain possession thereof.” This
 in by way of reply to Mr. Pow, and it is not contra-
 d by him, and therefore I must take it for granted
 though the original title commenced in August, 1841,
 it was prevented, I will not say from being rendered
 perfect, but from being rendered more regular, till
 , 1842. [*Addams*.—The application to Mr. Pow for the
 ficate was not made till after the ship had gone to Rot-
 um, and then the certificate was in the hands of the
 er.] I do not know that I can receive any explanation
 his description without regard to the evidence in the
 a. That evidence is, that application was made to Mr.
 for the purpose of obtaining the register, to have
 s bills of sale or mortgages endorsed thereon. If Mr.
 had meant to put in issue the question as to the period
 me when such application was made, or, what is really
 most important point—if there be any importance in
 part of the case—the time at which it came to his know-
 e that any such mortgages or bills of sale existed, it

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should have been specifically pleaded. But that is of no importance when this case comes to be sifted; for if he did not know of the transfer of the mortgages to Mr. Cannon, he knew that there were mortgages to other individuals, and he knew that the beneficial interest of Mr. Richardson, the owner, was mortgaged to the full extent. It is, therefore, impossible, in my opinion, to contend that Mr. Pow was not perfectly aware that this vessel was the subject of mortgage.

Now let us see what takes place. It appears that, early in February, 1842, the vessel is chartered by Mr. Pow—the actual charterer, or the agent of the charterer—for the purpose of proceeding with a cargo of coals from Newcastle to Exeter. She meets with some damage, and comes into the port of Cowes. It is there necessary that she should have some repairs. These repairs are done, and it is stated, on behalf of Mr. Pow, that he advanced money for the purpose of these repairs. Now, assuming all this to be true, several questions arise. In the first place, I exceedingly doubt whether, under these circumstances, it could bind the owner, through the medium of the master; whether, when there are means of immediate communication with the owner of a vessel, you can affect the owner through the medium of the master. But, be that as it may, all that could possibly be done, under the existing circumstances, was to bind the owner himself, and by the law of England, the master himself. It appears, however, that, on the 17th May, the vessel having returned to Newcastle, Mr. Pow took a bill payable at Rotterdam by the master. I asked, I think not unnaturally, how the bill came to be payable at Rotterdam, and I got no satisfactory explanation. I confess that, to my mind, this circumstance is full of suspicion. It does very much seem to me, looking at this part of the transaction, coupled with the conduct of the parties, that it has strongly the appearance of a deliberate plan to render the ship liable for that debt, to which, by the law of England, it would not be liable. But see what follows. Mr. Pow sends this vessel to Rotterdam. It is said that Mr. Pow is the charterer; but Mr. Pow states that he advanced £40. 19s. to fit her out

Rotterdam. She goes to Rotterdam, and as soon as she is there, or shortly after, here is the promissory note, demand is made for the £40. 19s., and Messrs. Dobree that they advanced the money on account of the master without any application, and the bond is taken from the master, and Mr. Pow is the person to whom it is assigned, Mr. Pow is the person suing in this Court.

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Now, morally speaking, I entertain not the shadow of a doubt that this was a scheme deliberately planned by Mr. Pow for the purpose of obtaining payment of the money previously advanced, for which he had no security by the law of England; and, by this ingenious scheme, it was intended to throw the burden upon the mortgagee of the vessel. And I may observe, that the mortgagee of a vessel has a better right to stand up and contest the validity of a bond, than as much as the owner. The law of this country, so much discouraging the mortgage of vessels, has given the master assistance towards rendering these mortgages a security, it being well known that it would be impossible that the great commercial marine of England could unless there were means of obtaining money upon the security of vessels themselves.

A deliberate plan to change the security.

much for the sums of money to which I have alluded. I have not the slightest hesitation in saying that, whether I look at the law, or to the transaction itself, tainted with fraud, on both grounds it is my duty to stand up against the validity of the bond as it relates to these two sums of money; and I must say, that the affidavits produced in this cause strongly confirm my opinion. Here is the affidavit of Mr. Pow, swearing that he advanced the sums of money *bond fide*, and that he believed they were expended in repairs; lastly, he makes oath that it was to protect the ship from the seizure to which she was liable by the law of Holland, and to enable her to proceed back to Newcastle, that William Miles was enabled to borrow, and did borrow, of Messrs. R. and J. Dobree, the several sums; whereas the truth is palpably that he was the cause of her going to Rotterdam, and the effect of the threat of arrest, and that he it was who put the

The affidavits.

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**The case tainted
with fraud.**

**Bond pronounced
against, with
costs.**

promissory note into the hands of Messrs. Dobree, and authorised them to proceed. But I hope the Court is not to be imposed upon by an affidavit of this description. Nor is it in the least degree mended by the affidavit of Messrs. Dobree, who seem to have lent themselves to the transaction in a manner by no means creditable to them. They swear that they actually and *bond fide* did advance and pay off to James B. Pow these sums. What do they mean by actually advancing? Why, if it were put into simple and plain English, the transaction was this:—that, having received a communication from Mr. Pow, of the situation he was in, they, by his desire, and by his direction, had given him credit for the sum, with directions to obtain the repayment on the ship itself. This part of the case is tainted with fraud from beginning to end.

I have now to address myself to the remaining consideration, namely, the £50 so advanced. Now, I doubt very much whether, when I find a bottomry-bond given in the form and under the circumstances in which this bond was given, and where the British master has been so imposed upon by threats improperly used—and which threats ought never to be employed on such occasions—I doubt very much whether I am justified, under any circumstances, in pronouncing for the validity of any part of the bond. But, under present circumstances, I am clearly of opinion that I ought not, because there is no evidence before me that this £50 was necessary for the purpose of enabling the ship to return from Holland; there is no evidence before me that what was necessary might not have been obtained from another house; there is no evidence that any such attempt was made; in short, there is no evidence whatsoever to clear up the suspicious part of the transaction. It is my conviction that this £50 was pressed upon the master to give a colourable appearance to the bond. I am perfectly satisfied that the bond cannot be pronounced for; I pronounce against it, with costs, and dismiss the party.

Proctors:—*Engleheart*, for the bondholders; *Pulley*, for the mortgagee.

Prerogative Court of Canterbury.

FEBRUARY 28.

CRAIGIE, BY HIS GUARDIAN, AND CRAIGIE INTER- Domicil.—A
ING, AGAINST LEWIN AND OTHERS.—*Act on Petition.* will made in
deceased in this case was Lieutenant-Colonel John England, by an
gie, who died at Hatchett's Hotel, Piccadilly, 23rd No- officer in the
ber, 1840, leaving a will (the subject of the suit) dated service of the
October, 1840. He left a widow and four children, all East-India
ra. The will, which was of the deceased's writing, Company, on
unattested, commenced as follows: "I, John Craigie, furlough, whose
utenant-Colonel in the East-India Company's service, domicile of ori-
in the Bengal establishment, do by this deed make my last gin was Scot-
and testament, *videlicet*." It then premises that, as his land, in the
was well provided for, by marriage-settlement and other, Scotch form,
he thought it unnecessary to make any further provi- and admitted to
for her, and after bequeathing certain legacies to rela- probate in a
proceeds:— Scotch -Court,
held to be in-
valid by the law
of domicile, the
deceased being
considered to
have been still
domiciled in
India.

er provision has been made for the payment of the above-
oned bequeathments, I leave and bequeath the whole of the
ning property of which I am possessed to my four children,
divided among them equally, share and share alike; the in-
terest, or such portion of the interest as the trustees shall think
proper, to be paid for the use of each child, and the principal to
be paid over and paid as each child shall respectively attain the
age of twenty-five years. I nominate and appoint the Reverend
John Lewin, John Pascal Larkins, Esq., of London, and Wil-
liam Bell, Esq., of Queen's Street, Edinburgh, to be executors of
this will. Witness my hand and seal, this 14th day of October,
1840, in the year of our Lord, 1840.

This will was signed by the deceased (being then at Hat-
tett's Hotel), and the envelope containing it was marked
with the will, John Craigie."

At the first instance, the executors were cited to propound
the will in this Court, or to shew cause why administration
should not be granted to Mr. Mackintosh, the guardian of
the children, the widow intervening in the cause. An ap-

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Lavin.*

1842.

July 12.

American.

1841.

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pearance was given to the decree on behalf of the executors under protest.

Addams, D., in support of the protest.—The question now is, not where the deceased was domiciled, but which is the proper Court to try that question. But the question need not be raised at all. The will is to the prejudice of nobody but the widow, and she has no desire that there should be any suit. The will has been proved in Scotland, and why should the question of domicile be raised here on behalf of the minor children, who are benefited by the will? The domicile may be collected from the language of the will itself, "I do by this deed," which shews that the deceased considered himself a Scotchman, and the will is valid according to the law of Scotland. This Court is not the proper *forum*; the Scotch Court is in possession of the cause; the will has been proved there with the consent of all the executors and of the relict, and any question of domicile should be raised in Scotland.

Robertson, D., on the same side.

Sir John Dodson, Q. A., *contrâ*.—The will is invalid if the deceased was domiciled in this country. It is impossible to divide the questions of domicile and the validity of the will. This is the strongest possible case of English domicile. Almost the whole property is in England (besides what is in India), the only available property in Scotland being £182. No question was raised in the Scotch Courts as to the domicile, or as to the validity of the will; they are, therefore, not really in possession of the cause. But there must be a representation here, and this Court must decide either to grant administration or probate of this will. Any party may call upon this Court to adjudicate on the question. The widow may have declared that she would not oppose the will, but had she then a full knowledge of her rights?

Jenner, D., on the same side.—The executors acted wrong in the first instance in taking the will to the Scotch Court.

SIR H. JENNER FUST.—Suppose the executors obtained probate of the will in Scotland, and the widow applied here for administration to her, on a suggestion that the deceased died without any will valid in law, and the executors had

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id, "Here is a will valid by the law of Scotland;" could the Court refuse to hear the question of domicile argued? the question of domicile were raised in both Courts at the same time, must it not be heard, an appeal from one decision going to the House of Lords, and from the other to the Judicial Committee of the Privy Council? I do not see how the Court can get rid of its jurisdiction.

I am clearly of opinion that the Court is bound to overrule the protest, and to assign the party to give an absolute appearance. The party deceased was a Scotchman by birth, but he left Scotland at an early age and went to the East Indies, where he obtained a commission in the East-India Company's military service: what may be the effect of the facts must be determined hereafter in this Court, or the Scotch Courts, or both. But the question will come to this,—what was the domicile of the party? The decision of this point must determine the validity of the will. The question now is, not as to probate of the will, but as to the jurisdiction of the Court,—whether a party interested in upsetting a will, by shewing it to be invalid, and which can only be done in this Court, should have an opportunity of instituting a suit here. How is it that such party cannot have a right to do so? I cannot see how, under all the circumstances, this Court can hold its hand; I cannot find any similar case in which this Court has held its hand. The great bulk of the property is in England, and I cannot see why the Court's jurisdiction should be objected to. The Court cannot stay its hand; I am of opinion that the Court is bound to proceed. Would it be an answer to a *mandamus* from the Court of Queen's Bench that the proceeding would be irregular, because it had been alleged that the deceased was domiciled in Scotland? I do not think the Court could make such a return. I do not consider that, by proceeding, it should deprive the Courts of Scotland of jurisdiction; that they have any privity of the cause or are in possession of it, and *melior est conditio possidentis*.

Under all the circumstances, I am of opinion to overrule the protest and require the party to appear absolutely. The

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widow's consent to the probate in Scotland is not binding upon her; there is nothing to shew that she consented with a full knowledge of her rights.

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An absolute appearance was accordingly given on the part of the Rev. Mr. Lewin, one of the executors, and his Act or Petition alleged:—

Petition.

That the testator was born at Glasgow, in 1786, of Scotch ancestors; that he was never out of Scotland till 1804, when he went to India, and entered the East-India Company's military service, in the 24th regiment of Bengal Native Infantry; that he continued in India till 1837, with the exception of two absences, between 1819 and 1823, and February 1834 and December 1835, on the first of which occasions he came to England specially delegated on a mission by the Marquess of Hastings, in discharge of the duties whereof he spent the greater part of his time in London, and where, in 1823, he married his present widow, who accompanied him back to India, and his second absence was to the Cape of Good Hope, for the benefit of his health; that the deceased left India in 1837, on a furlough for three years, renewable as of course for two years more, within which period he reckoned that his then rank of lieutenant-colonel would turn into full colonelcy, so as to preclude the necessity of his returning to India; that the deceased at all times entertained and expressed an aversion to India as a place of residence, and on his final return from thence (in August, 1837), he proceeded direct to Scotland, where he arrived with his wife and family in October, 1837; that from such time till August, 1839, they resided in Scotland, though only in a furnished house, but the deceased was in search of a more permanent description of residence, and in 1838, he used ineffectual endeavours to purchase the lease of a mansion called Muirhouse, near Edinburgh; that in August, 1839, the deceased's health and that of his family being such as to require a change of air, they quitted Scotland, under medical advice, and came to England, and after occupying furnished lodgings in London for about nine months, removed for the sake of a warmer climate to Plymouth, where the deceased's family continued in the occupation of furnished houses till his death; that the deceased himself was not at Plymouth after September, 1840, when he went to Scotland, where he remained till November, and died suddenly on his way from

and to Devonshire, there to rejoin his family: affidavits and oaths were annexed in supply of proof.

reply to the Act, on behalf of the minors, it was alleged that domicile of the deceased was uninterruptedly English from his entrance into the East-India Company's service in 1804; that the wife he married in 1823 was an English woman; that his eldest son was sent from India to England for education, and did not return to Scotland previous to 1837; that the deceased had obtained a prolongation of his furlough till 4th March, 1841; that he was not with his wife and children in Scotland at any time subsequent to August, 1839, and the only occasion of the deceased's coming thither was in September, 1840, when he attended his father in his last illness, and he returned to England immediately after the funeral.

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Edwards, D.—The general principles of domicile are known and admitted. *Bruce v. Bruce*.* I admit that, by proceeding to India and entering the military service of the East-India Company, the testator became an Anglo-Indian, or British subject, by domicile; but I contend that he abandoned his domicile of origin, and that he resumed his domicile of origin. The domicile of origin is easily recovered, and if it is still a matter of doubt, the domicile of origin should prevail. This is not a case of distribution under an intestacy, but a case of testacy, to which different considerations apply. Under what circumstances did he abandon his acquired domicile in 1837? He quitted it on a three years' furlough, in expectation that he should become a full colonel, and be enabled to retire. In his letter to Mr. Bell, 26th June, 1840, he discusses the expediency of obtaining a seat in Parliament, and he says, "I hate the thoughts of returning to India." Although, therefore, he had become an Anglo-Indian, he had completely abandoned that domicile. Did the domicile of origin then revive? I should have much to say, on reason and principle, in favour of the affirmative of that question, if it were *res integra*; but the case of *Munroe v. Douglas*† is against me. I contend, however, that he recovered his Scottish domicile, both in fact and intention. Immediately on his return, he proceeds to Scotland, and re-

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* 2 B. & P. 229 n.

† 5 Maddox, 379.

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sides there with his family continuously for two years, 1839. Suppose he had died *in itinere* from India to Scotland, that would have sufficed to give him a Scottish domicile under *Munroe v. Douglas*. It was not his fault that he did not obtain a permanent abode in Scotland. In his letter to Mr. Barstow, 7th May, 1840, he says, "I have been sojourning during the last twelve months in England, and contrasting the softness of Devonshire with the rigour of your northern capital; but the climate here, though mild and grateful to the senses, is, I think, enfeebling to the constitution, and does not agree with me and my family so well as Scotland; I am purposing, therefore, to return and fix myself somewhere near Edinburgh." In his letter to his sister, 16th September, 1839, he says, "I long to be happy and once more settled in a comfortable house;" and in another, dated 14th October, 1839, "My wish and desire have long been to settle somewhere near Edinburgh, which I am quite certain is better suited for all of us than any other place." The cases of *Somerville v. Somerville*,* *Bruce v. Bruce*, and *Munroe v. Douglas*, were questions of distribution under intestacy. Where a person dies intestate, the presumption is that he intended his property to be disposed of by the *lex domicilii*; but there is no such presumption where there is a will. Here the testator shews the mode in which he wished his property to be disposed of, and is the Court to be astute to defeat his intentions? By the very terms of his will, he fixes himself a Scotchman, and it was evidently executed under the impression and belief that it would carry out his intentions.

Robertson, D., on the same side.

Sir J. Dodson, Q. A., contra.—Our case is, that the English domicile, which the deceased acquired when he went to India, was never put off. The doctrine laid down by *Sir John Nicholl*, in *Stanley v. Bernes*,† and confirmed by the Court of Delegates, is, that the *lex domicilii* applies in cases of testacy as well as of intestacy. This rule has been followed in *De Bonneval v. De Bonneval*.‡ The acquired do-

* 5 Ves. jun. 750.

† 3 Hagg. E. R. 373.

‡ 1 Curt. 284.

can only be put off *animo et facto*, not by intention

Munroe v. Douglas. The deceased never had any or permanent abode in Scotland after his return from

Whilst he retained his commission in the military service of the East-India Company, he was liable to be sent back to India, and it is clear from his letters that he contemplated the necessity of returning thither. He writes to Bell:—"I ought to have been a colonel a year ago by usual calculations, but I have still five steps to get beyond that result; now, unless I get these steps in the next twenty months, I must return to India, or I should be out of the service, according to Act of Parliament." There is, therefore, no abandonment of his Anglo-Indian domicile; he might have contemplated fixing his residence in India and after he had obtained his colonelcy, but that was a floating intention; his letters shew that he had not made up his mind. The will is called a "deed," and it is inferred that the deceased considered himself a domiciled man; but it begins by describing him as "a lieutenant-colonel in the East-India Company's service." A law term, finding its way into the will of a person of Scotch origin, proves nothing, and the bulk of his property was in England.

per, D., on the same side.

H. JENNER FUST.—The facts of this case lie within the compass, and I do not think it is difficult to determine the law which is applicable to them.

The domicile of the deceased was in Scotland, or India, or England; but it is quite immaterial for the present purpose whether it was India or England, because the law of India and England is the same with respect to the execution of wills. The Legislature of India having assimilated the law of England to the law of this country. By birth he was a Scotchman, but he abandoned his domicile of origin, and acquired a new domicile, when he entered the service of the East-India Company. When he was in England from 1819 to 1823, he did not visit Scotland, and the explanation given is, that he was on a special mission from the Marquess of Hastings, duties of which occupied most of his time. I therefore

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deceased.

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pass by this circumstance, and the visit to the Cape of Good Hope. I do not think it is a very important circumstance that, when in London, in 1823, he should have married an English lady, he being then domiciled in India. As it does not appear that he had any intention of relinquishing the service till he had got a full colonelcy, on his return from India, in 1837, he must have contemplated at least the possibility of being obliged to go back again for a short period.

From the circumstances stated in the Act on Petition and the affidavits, the Court may come to the conclusion, that, if every thing had fallen out according to his wishes, the deceased would have taken up his residence in Scotland; for it is impossible to look at his letters without seeing that he had a decided preference for the place of his birth; but, as it has often happened, his wife was of a different opinion; she preferred a residence in England, and she persuaded the deceased that it would be better for her and the children.

It has been asked by one of the Counsel, when was it that the Indian domicil was abandoned and the Scotch domicil re-acquired? The answer was,—when he went to Scotland in 1837, for the purpose of residing there; and the question is, whether, when he came from India in 1837, and went to reside in Scotland, he went there *animo manendi*, with the intention of taking up his final and permanent residence there. This depends very much upon his situation at the time,—whether he could abandon his Indian domicil whilst he held a commission in the East-India Company's service. If it was not his intention to abandon his acquired domicil, the fact of his going to Scotland would not be sufficient; and he could not carry that intention into effect but upon a condition, since, whilst he retained his commission, he must have returned to India if a certain event did not take place. What was his situation in the year 1837? It is clear that, when he arrived here, he retained his commission in the East-India Company's service; and not only so, but he came here on leave of absence, with (it is said) a great probability of its being extended, from 1837 to 1842, and he did apply for and obtain an extension of the term. He quitted India only for temporary purposes; he left it not with any fixed

intention not to return, except on one condition—namely, his attaining a full colonelcy, and therefore it comes to this question: whether, having quitted India for temporary purposes, he converted this temporary removal into a permanent abandonment of his acquired domicile.

The important point is, whether, when he went to Scotland in 1837, he went there *animo manendi*. I am of opinion that he went with the intention of residing there so long as the rules of the service would permit, but no longer, and it appears from his correspondence that he did contemplate a return to India, in order to be in a situation to obtain the rank in the service he sought, and then to quit India for ever. In proceeding to Scotland, therefore, he cannot be said to have changed his domicile *animo et facto*; he went to reside there only during the term of his absence from India, for when he should return to India, I do not say his Indian domicile would have reverted, for in point of fact he had never been divested of it. He quitted India for temporary purposes, which might have been converted into permanency, if a certain *casus* had happened in the meantime; but I cannot conceive that a person who still holds a commission in the East-India service, constituting the domicile of the party, who is absent from India on leave for a definite period, capable of being extended, can be said to have left his domicile and taken up another *animo manendi*.

In 1839, when he quitted Scotland, his Indian domicile still continued; I do not consider that, having left England in 1837 and proceeded to Scotland, he had divested himself of the domicile he had acquired by entering the East-India Company's service. In 1839, he returned to England with his wife and family, and if the question had been whether he had abandoned his Indian domicile and acquired an English domicile, there might be some doubt. But this is not a question between an Indian domicile and an English domicile, but between an Indian domicile and a Scotch domicile. In 1839 and 1840, he was resident in this country, with the exception of a short time, when he went alone to Scotland; he returns to this country, with the intention of joining his

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tutes change of
domicil.

wife and family at Plymouth, and during the journey he dies in London.

The great question is this: what is necessary to constitute a change of domicil? The answer is, that it must be effected *animo et facto*; both must concur: it is not enough that there should be intention, without the fact; it is not enough that there is the *factum*, without the *animus*. The result of all the cases shews that, should either circumstance be deficient, the domicil is not changed; that a domicil once acquired remains till it be thus altered and another acquired; and that length of time is not sufficient, if the purpose be temporary, whilst one day may suffice if the intention be fixed. If a person remains a single day in a country with the intention of taking up his permanent residence there, that may be sufficient to change the domicil; on the other hand, whatever length of time he may remain there, the domicil will not be changed, unless intention conspire with the fact.

The evidence.

What is the effect of the exhibits annexed to the Act on Petition? The letter from the deceased to Mr. Barstow, dated "Plymouth, 7th May, 1840," shews nothing more than an intention, a wish, to settle in Scotland, if he could get the lease of Muirhouse, near Edinburgh; it shews no more than a wish and intention to settle there. On the 26th June, he writes to his friend, Mr. Bell, and in this letter he speaks of the probability of his being obliged to return to India, if it be only "to go out and come back." How, then, can it be said that, at that time, he had finally abandoned India? He says, "I long in the meantime to get myself fixed in some location where I could take root:" so that he did not consider himself located, though he had an intention of "taking root" somewhere. The letter further mentions his desire to place his son with a civil engineer in the neighbourhood of Edinburgh—all shewing a wish and intention and inclination to settle in Scotland if circumstances enabled him to do so; but this letter proves that his location was not fixed on the 26th June, 1840. There are other letters, or parts of letters, from the deceased to

ter, in 1839, which carry the case no further; they
he wish of the deceased to settle in Scotland, but not
e had done so: he was still subject to be called to

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e are some affidavits, the most important of which,
se who contend for the Scotch domicil, is that of Mr.

one of the executors, as well as one of the parties,
poses that the deceased has on many occasions ex-
l to him "the greatest aversion to India as a place of
ce even," and that the deponent is impressed with
ng persuasion that his visit to Scotland in 1837 "was
view all along to a more permanent description of
ce there." This appears to me to carry it no further

Shews inten-
tion, but not
fact.

e expression of a wish and intention to locate him-
Scotland, but it does not shew that he had done so.

independent of this, I am of opinion that the de-
had not abandoned his Indian domicil, and was not
tuation to do it; that he never intended to do so
he obtained the rank of full colonel, and therefore,
h he might have had an intention to settle in Scot-
nd although he might have actually purchased a
here, and resided there during the whole time, I
have a difficulty in holding, as he still retained his
sion, obliging him to return to India, though only
ort time, that he had actually abandoned his Indian
and re-acquired a Scotch domicil. I cannot under-
ow he could have abandoned his Indian domicil
the connection which gave him that Indian domicil
sisted in full force.

of opinion that the domicil of the deceased acquired
a was never abandoned, and that he was still domi-
iere at the time of his death, and his domicil being
or English, not Scotch, the Scotch law cannot deter-
e validity of his will. I must pronounce against the
r of the will, as not executed conformably with the
ns of the Will Act, under the decisions in *Stanley*
es, and *De Bonneval v. De Bonneval*, that the law
to cases of testacy as well as of intestacy—that is,
ould have to determine the question, I should decide

The Indian
domicil never
abandoned.

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Craigie v. Lewis.

Proctors :—*Fox*, for the party proceeding ; *Pitcher*, for the party cited.

A will, revoked by a subsequent will, which is destroyed, is not thereby revived; a will once revoked by a later will can only be revived by re-execution, or re-publication.

MAJOR AND MUNDY V. WILLIAMS AND ILES.—*Cause.*—In this case, Charlotte Barfield, widow, the deceased, died 18th May, 1842. On the 15th January, 1841, she duly executed a will, whereof she appointed Messrs. John Major and Matthias Mundy executors. On the 2nd February, 1841, she gave instructions to her solicitor for, and duly executed, another will, whereby she, in express terms, by a special clause to that effect, revoked all former wills by her made. On the 3rd May, 1841, she again gave instructions to her solicitor for a new will, and duly executed this third will, and thereby, in express terms, by a special clause to that effect, revoked all former wills by her thenceforward made. The two later wills were, after their execution, in the possession of the deceased, but since her death neither of them has been found. Probate of the first will (of 15th January, 1841) was stopped by a *caveat* entered by Jane Williams, widow, and Ann Iles, wife of Henry Iles, cousins and next of kin of the deceased. The executors, being put on proof of the first will, gave in an Allegation, pleading its execution. The next of kin, in an Allegation, pleaded the execution of the second and third wills, whereby the first will was revoked, and that the deceased having died without having re-executed the first will, or any codicil reviving the same, the first will, of 15th January, 1841, is null and void. The executors, in a responsive Allegation, pleaded that the deceased had been seriously indisposed from the 17th November, 1840, and attended by a nurse; that she repeatedly said, during the interval between that time and her death, that she had been induced by her relations at Epsom to sign some paper or papers in their favour, but that she had destroyed the same; that her will was in the

ds of Mr. Mundy, and that he and Mr. Major were her
tutors. The property amounted to about £600.

ddams, D., for the executors.—The question whether the

of 15th January, 1841, is or is not revoked, depends
n the construction of the 20th and 22nd sections of the

ll Act. I admit that, according to the literal interpre-

on of the two sections, a will is revoked by a subse-

ntly executed will, and can only be revived by re-execu-

, or by a codicil shewing an intention to revive the

ae. But the question is, what is their true interpretation?

e Act has no preamble, but the subject-matter of the

t may restrain the operation of general words. It is

orious that the Act was founded upon the report of the

w of Property Commissioners, and that the great object

it was to do away with the varieties of execution, and

introduce one uniform mode. If a literal construction

the Act would lead to absurd consequences, the Court

ld depart from such literal interpretation, as was done

Hobbs v. Knight,* and *Brooke v. Kent*.† The literal

ring of the 20th section is, that a will is revoked by

execution of another will, or by some writing declaring

intention to revoke; but when the Legislature says, in

22nd section, that no will, which shall be in any man-

revoked, shall be revived otherwise than by the re-

cution thereof, or by a codicil shewing an intention to

ve the same, taking this in conjunction with the 20th

ion, it must mean such instrument being in existence at

period. If this is not the construction, the consequences

be absurd. The intention of the Legislature may have

a that, in order to revoke a will by another, or by a

ing declaring an intention to revoke, the intention

ld appear on paper; then, that the former will should

revive but by re-execution or by codicil. By the old

s if a will was revoked by another will, a testator might

duce the former will, and say, "This is the will I wish to

rate." But the Act is to do away with parol evidence,

see the consequences: a will may be revoked by oral

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* 1 Curt. 768.

† 1 Notes of Ca. 93.

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evidence of a destroyed will. Suppose a will thirty years old, and two witnesses come forward and say the deceased made another will by which that will was revoked, that, at some time and some place, a subsequent will had been executed. I consider the true interpretation of the Act to be this: that a will can only be revoked by another will, or by some writing declaring an intention to revoke, but that the will or paper must be in existence at the time of the testator's death, and the Statute says, there shall be no revival but by a formal execution, not by parol evidence. Suppose there is evidence that the testator did execute a will, is that to operate to the revocation of a former existing will? This would give great power to a disinterested legatee.

Jenner, D., and White, D., contra, were stopped by the Court.

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SIR H. JENNER FUST.—The effect of the intermeddling will was to revoke all prior wills made by the deceased, consequently to revoke the will of January, 1841, though remained uncanceled. The 20th section of the Act enacts "that no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required." Now it is admitted that another will was executed according to the Act, and what was its effect? To revoke the former will, and no doubt that will was revoked to all intents and purposes, but it had no effect during the existence of the other will. Then how could it be revived? By the 22nd section it is enacted "that no will or codicil, or any part thereof, which shall in any manner be revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and shewing an intention to revive the same." When I find a will revoked by the execution of another will, as there is no codicil, I am to hold that there has been any re-execution. Now there has been no re-execution at all; there has been a destruction of the second will, but not a re-execution of the first will, and cannot, in the face of the words of the Act, "in any manner revoked," hold that, by the destruction of the second

will, the first will, which had been revoked by the second will, was revived.

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I am of opinion that, under the two sections of the Act, and the general tenour of the Act, a will once revoked by the execution of a later will could not be revived in any other manner than by the re-execution or re-publication of that will. I therefore pronounce against the validity of this will.

Will pronounced
against.

Proctors:—*Blake*, for the executors; *Blackburn*, for the next of kin.

MORRICE v. MORRICE.—*Cause.*—The testator, William Morrice, died 2nd September, 1842, leaving a widow, but no children. Shortly after his death, three papers of a testamentary nature were found—namely, a will (A) dated 30th September, 1834, attested by three witnesses; a will (B) dated 5th December, 1838, in his own handwriting, signed, but not attested; and a will (C) dated 14th January, 1839, attested by three witnesses. The last paper was found locked up in the deceased's writing-desk, in his counting-house at St. Mary Axe; the other two papers were found sealed up in the same envelope in his bureau at his residence in Cornwall Terrace, Regent's Park. In paper C occurs the following paragraph: "And I hereby appoint my said wife, together with my said brother John, and his son, William David Morrice, of Cambridge, executors of this my will, to whom jointly I commit the winding up and settling of all my worldly affairs and matters of business, observing as closely as possible a paper of directions left by me for that purpose, in a will made by me in or about the year 1834, and now in my private bureau, at my house, No. 14, Cornwall Terrace, Regent's Park, London, and bearing date in or about November or December, 1838." Paper B commences thus: "I revoke all former wills, or at least such parts of them as would interfere with the arrangement of my property; as to the wishes expressed as to the burial of my remains, I have no wish to change my ideas;" and it concludes thus: "After this has been done"

A will, in 1839, refers to a will in 1838, which refers to a paper in a will of 1834,—probate of all, as together containing the will, — refused. — Such questions cannot be decided on *ex parte* motion.

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Morrice.*

(viz. several legacies paid), "I would again return to the terms of my will of 1834, which, had not circumstances been altered, I would not have altered; but from my losses this year, and the sale of Donesborne, renders it necessary." The passage cited from paper C was considered to refer to paper B, and that from paper B to paper A.

Nov. 7.

On the first session of Michaelmas Term, 1842, a motion for probate of all the papers, as together containing the will of the deceased, was rejected, the Court requiring that the paper should be propounded. An Allegation was accordingly offered, in a friendly suit, on the part of the widow, pleading the facts, with a view of obtaining probate of all the papers.

Nov. 24.
ARGUMENT.

Phillimore, D., for the brother of the deceased and one of the executors, opposed the admission of the Allegation, citing *Molineux v. Molineux*;* *Habergham v. Vincent*†; *Smart v. Prujean*‡ and *re Lady Durham*§. The case of *Molineux v. Molineux* was the first instance in which a Court of law decided that a paper *dehors* the will, referred to in it, formed part of the will. In *Lady Durham's case*, under the new law, recently decided in this Court, the paper referred to was a regularly executed document, and there was no doubt of its identity; but that, as other *ex-parte* motions, was decided *pro re natd*, and it is still a grave question, which this Court has not formally decided, whether, under the new law, a paper not seen by the witnesses can have operation. The object of the Will Act was to make the provisions of the Statute of Frauds more binding—to oppose greater difficulty in the way of fraud, and it is a *sine qua non* that the witnesses shall subscribe the very instrument in the presence of the testator, to prevent the interpolation of a will. There cannot be a greater facility offered to fraud than to allow papers *dehors* a will to be incorporated with it.

Sir John Dodson, Q. A., for the widow.—It is clear that the paper C is entitled to probate, and the reference to B, which likewise refers to A, renders it necessary that

* Cro. Jac. 144.

‡ 6 Ves 565.

† 2 Ves. jun. 209.

§ 1 Notes of Ca. 265.

all the papers should have probate together, without which it will be impossible to effect the wishes and intentions of the testator. In *Molineux v. Molineux*, the testator had not before him, any more than the witnesses, the paper pronounced for as part of the will. In *Lady Durham's case*, he will was not before the testatrix when she referred to it, and though a regularly executed will of Lord Durham, it had been revoked by him; yet the Court admitted it to probate as part of the will of the Countess. There can be no doubt of the identity of the papers referred to here, and it is clear that it was the testator's intention that they should operate together as his will.

FEB. 28.
 —
Morrice v.
Morrice.

SIR H. JENNER FUST.—If the Court had any reason to PER CURIAM expect that it could obtain any further information respecting the deceased's affairs beyond what is pleaded in this Allegation—beyond the *factum* of his former wills, and the places where the papers were found,—the Court would admit this Allegation, subject to all the objections at the hearing of the cause, in order to form its own opinion as to the intention of the deceased and the effect which the other papers would have upon his property, as disposed of by paper C; but as no further information can be expected to be produced, and since the Court must be left to find its way as well as it can as to the real intention of the deceased, and the operation of the papers, I must give my opinion in this stage of the case. It is a question of great importance to the practice of the Court hereafter, and as to how far it squares with the principles applied to such cases before the passing of the late Act, and whether the late Act is to be governed by different rules of law. I have before stated, with reference to *Lady Durham's case*, how very inconvenient it is to dispose of such cases on *ex-parte* motions. These cases are pressed in that shape on every occasion, ever since the Court allowed the paper in that case to go to probate, and more cases of this kind have been brought to the notice of the Court since that motion than I ever recollect at any former period. I must take time to consider whether the circumstances of this case differ from those of other

Want of information.

Inconvenience of deciding such cases on motion.

Cur. adv. vult.

FEB. 28.

*Morrice v.
Morrice.*Such ques-
tions cannot be
decided on mo-
tion.

cases. Lord Hertford's case* may have some bearing on this case. The will disposes of both real and personal property, and the same rules must apply to both.

Let it be understood that I will not on *ex-parte* motion decree probate of such papers. We must recur to the practice, of propounding the papers.

The Allegation was subsequently admitted to proof, five witnesses were examined, whose testimony did not meet the circumstances of the case.

1843.
Feb. 28.

Sir J. Dodson, Q. A., and Phillimore, D., argue before.

JUDGMENT.

Want of in-
formation.

SIR H. JENNER FUST.—The Court has no information in this case as to the real state and condition of the deceased's affairs, or as to which way its decision would fulfil his wishes. The Court, therefore, is left very much in the dark, notwithstanding the case has been argued upon the Allegation; the parties decline to furnish information, and leave the Court to find its way as it can.

Unless the papers of 1834 and 1838 are incorporated with that of 1839, the Court cannot pronounce for the validity of the three papers. What is the paper of 1839, the last of the deceased? That will commence with revoking former wills and codicils by me at any time made." The testator terms it his "last will and testament;" and it contains a complete disposition of the whole property, real and personal, directing his executors, in winding up his affairs, to observe "a paper of directions left by me for that purpose in a will made by me about the year 1834," which was to be found in a certain place. Now, this passage refers to a paper of directions; it does not refer to the will of 1839, but to a paper of directions left by him in a will of 1834. It was by that paper of directions the executors were to govern themselves. But there is a discrepancy between the paper and the whole disposition contained in the will.

* See *post*, March 17.

and I cannot be satisfied that the deceased meant and intended it to be incorporated as a part of the will. It is not the case in *Habergham v. Vincent*, *Smart v. Prujean*, or *Durham's case*, where there were directions by which the disposition was to be governed, and no discrepancy appeared between the papers; here is a complete discrepancy. It is only under certain circumstances that he has wished that such and such things should be done, but not directed that the paper should absolutely govern the disposition of his property. The will of 1839 disposes of the whole property; the paper of 1838 makes a different disposition: how can they be incorporated as parts of one will? It is difficult for the Court to conceive how it ever was the intention of the deceased to incorporate this paper into his will. But the Court is required to go further and pronounce for another regularly executed will, disposing of the whole of the deceased's property, and appointing different executors from the will of 1839, and conferring a different disposition. How is this to be done? I cannot see how this is to be incorporated as part of the will, and it is to be so incorporated only because of the words which appear in the will of 1838, "I would again alter the terms of my will of 1834, which, had not circumstances been altered, I would not have altered; but from the time of this year, and the sale of Donesborne, renders it necessary that I should alter it." The cases of *Habergham v. Vincent* and *Smart v. Prujean* go against the proposition, that an unexecuted paper, which is referred to by a regularly executed will, may be treated with and taken as part of that will; though it is clearly shewn, in the opinion of a learned judge, that it was rather an evasion of the law to give effect to such a will, from the expression of Lord Eldon, in *Wilkinson v. Iremonger*:* "The cases, so far as they have gone, have created doubts even as to a paper antecedently existing, and early and undeniably referred to in a will; but I

FRA. 28.

*Morrice v.
Morrice.*Discrepancy
between the pa-
pers.

* 1 Ves. & B. 445.

FEB 28.
Morrice v.
Morrice.

take it to be decided, and there is no doubt, that a paper made afterwards could never be a part of the will." The law now is, that a paper directly referred to in a last will though such paper be unexecuted, may be considered as incorporated and forming part of the will, though the Court must consider whether the contents of the paper would admit of its being carried into effect; and if the deceased in this case had expressed his intentions so clearly that there could be no doubt, I should have adopted that rule; but I am not of opinion that he has so expressed himself, and difficulty arises with respect to the clause of revocation, as he calls the will of 1839 his "last will and testament," and there is a different disposition of the property in each. The case should be clear of all doubt, and the Court should be able to give effect to the will. I am of opinion that the case is not so clear. If the circumstances were such as to call upon the Court to look into the deceased's affairs, the party should have afforded the Court instructions for that purpose. I confess there is considerable difficulty in regard to the deceased's affairs; but I find that, in 1838, the alteration of his circumstances was such as to lead him to alter the will of 1834, and he would not have done so but for the losses he had sustained and the sale of Donesborne—this appears on the face of the paper, notwithstanding that it is singularly worded—and if a party has any claims, I do not see that they may not be enforced in a Court of Equity, notwithstanding that this Court should not grant probate of the paper.

Will of 1839
 pronounced for
 alone.

I am of opinion, so far as the circumstances of the case appear, and from the information before me, that the will does not contain such a distinct direction that the paper should form part of his will, as to enable the Court to decree probate of all the papers together, and I am of opinion that the paper of 1839 contains the will of the deceased. The case is very unsatisfactorily instructed, I must say.

Proctors:—*Farquhar*, for the widow; *Annard*, for the executor.

High Court of Admiralty.

MARCH 2.

R “RIBY GROVE.”—Summary Petition.—This was a **Wages.**—A
 a mariner to recover wages under the circumstances taken fish, was
 rth in his Summary Petition, which now stood for ad- wholly lost, but
 on, and which alleged that, on the 14th March, 1838, a part of the
 liby Grove being at Hull, destined on a whaling voy- oil was saved;
 the Greenland fishery, the master hired the mariner a mariner had
 rose Leake) to serve as cook on board during the contracted to
 re, at the rate of £2. 15s. per month and 1s. 9d. per serve, on condi-
 f oil obtained, and that he (Leake) signed the usual tion of receiv-
 articles; that the vessel proceeded to the fishery, and ing an allow-
 5,333 seals and 7 whales, yielding 90 tuns of blub- ance per tun of
 id two tons of whalebone; that on the 27th June, she oil obtained, in
 ammed amongst the ice, became a total wreck, and addition to his
 down; that by the exertions of the master and part of monthly wages:
 rew (including Leake), and with the assistance of two — Held, that
 n whalers, 70 tuns of blubber were rescued from the this was a spe-
 l, besides stores, consisting of whaling-boats, whaling- cial contract,
 provisions, &c., to the value of £100; that the master and of the na-
 part of the crew (including Leake) were taken on board ture of a part-
 wo foreign vessels to Elmshorn and Bremen (the ports nership, there-
 hich they belonged), where the 70 tuns of blubber fore not within
 landed and deposited to abide the claims of the parties the jurisdiction
 ed thereto; that, in July, Leake arrived in England, of this Court.—
 plied to Mr. T. W. Torr, the managing owner of the Summary Peti-
 Grove, who was one of the owners of the 70 tuns of tion rejected.
 or the payment of £9. 18s., balance of wages (including
 oney), which he refused on the ground that the title to
 property saved was undetermined; that, in August,
 , Leake, having ascertained that Mr. Torr had received
 value of a very considerable part of the oil, made a fur-
 application to him, but payment was again refused,
 gh Mr. Torr admitted that he had received the value of
 tuns of oil; that such value, at £30 per tun, would
 unt to £450, and that, on application to them, the

MARCH 2.

Riby Grove.

owners of the foreign ship at Elmshorn stated that the oil taken on board their vessel had produced £884, one half of which had been paid to the owners of the *Riby Grove*; and the owner of the other foreign ship at Bremen stated that he had paid to the owners of the *Riby Grove* £454.

Feb. 21.

ARGUMENT.

Addams, D., for the owners.—The ship having been lost, the question is, whether the mariner can have his wages decreed out of the proceeds of the oil saved, for as to the boats and stores, it is not suggested that they came to the hands of the owners. If the voyage had terminated favourably, he would have been entitled to 1s. 9d. per tun of oil caught; but could he recover it in this Court? In the "*Sydney Cove*,"* it was held by Lord Stowell that this Court had not jurisdiction to entertain a claim for a share in the proceeds of the oil taken in a whaling voyage. In *Jesse v. Roy*,† it was held by a Court of Law, that oil-money could not be recovered till the arrival of the oil in this country. It is a hard case upon the owners to be sued for wages after a lapse of so many years.

Phillimore, D., for the mariner.—The case of the mariner is much harder than that of the owners, in being kept out of his wages for four or five years, whilst there is an ample fund (upwards of £900) out of which to pay them. The oil was saved partly through the exertions of the crew, which would entitle them to salvage. In the "*Neptune*,"‡ Lord Stowell said that although, generally speaking, the crew cannot claim as salvors, as they contract to serve in all weathers, and to save as much of the ship and cargo, in case of shipwreck, as they can, still that "circumstances might present themselves that might induce the Court to open itself to their claim of a *persona standi in judicio*." [PER CURIAM. I could not give salvage in a suit for wages.] In the "*Sydney Cove*," the Court rejected the claim on the ground that it could not adjudicate in a partnership transaction; but it is not so here; the oil-money is part and parcel of the seaman's wages. [PER CURIAM. Am I to take the amount of the property saved, and apportion it among

* 2 Dods. 12.

† 4 Tyrhw. 626.

‡ 1 Hagg. A. R. 232.

whole of the mariners? I could give you only your MARCH 2.
 .—*Addams*. You cannot claim out of the cargo; only *Riby Grove*.
 f the ship and freight.]

R CURIAM.—I must consider this case; it is an im- *Cur. adv. vult.*
 nt one with regard to the jurisdiction of the Court.

L. LUSHINGTON.—It is alleged in this Summary Peti- MARCH 2.
 hat, at the time of the loss of the vessel, a certain part JUDGMENT.

r boats and of her apparatus was saved; but, as was
 observed, at the argument, it was not averred that the
 rs of the vessel ever received the property so alleged
 ve been saved. Under certain circumstances, unques-
 bly, the saving of any part of the vessel, and of the ap-
 pus belonging to the vessel, might be a very important
 dient in the judgment the Court has to pronounce;
 think that, upon the present occasion, that averment
 loose to be permitted to have any weight at all upon
 ecision. However, a part of the cargo was saved, and
 d into Holland—the amount saved appears to me to be
 ry little importance at present: it is alleged that a cer-
 amount of money was due to the owners on account of
 saved, salvage being deducted, and that it has been paid
 to them; and I am asked now to admit a Summary
 on on behalf of a party claiming to be paid out of the
 rty so saved.

w, it appears to me that two questions arise in this The questions.
 ssion—one is, whether the wages are truly due; the
 , whether this Court has jurisdiction to entertain
 to decide upon the claim. With regard to the first
 , I know not that it has, and I believe it has never,
 decided in this Court at all; I mean the question,
 e part of a cargo has been saved, and the ship has been
 ly lost, how far a mariner can prosecute a suit for
 s against the cargo itself. I find that this question was
 l upon a former occasion, and that no opinion was pro-
 ced by the learned Judge thereon. I allude to the
 of the "*Lady Durham*,"* and the words used by Sir
 Nicholl are these: "Whether, if any cargo were
 d, it could be held to represent the freight, I give no

* 3 Hagg, A. R. 196.

MARCH 2.
Riby Grove.

opinion ; it might raise a very different question from the present." That was a case which apparently underwent very great consideration. It was the case of a ship "designed on a trading voyage from Liverpool to Africa and back ; she sailed with goods for barter, and on her voyage home was, with her cargo, totally destroyed ; the ship and cargo were the property of the same owner, and were insured ; Held, in an action for wages against the owner, that, in conformity with the general rule of law, that freight is the mother of wages, the Summary Petition was inadmissible. A mariner has no *lien* for wages on the cargo, as cargo ; his *lien* is upon the ship and freight." Now, that case is unquestionably very much distinguished from the present in two essential particulars. First, in the case of the "*Lady Durham*," the whole of the cargo was lost ; and, secondly, the *Lady Durham*, with her cargo, was the sole, entire, and complete property of the owner, and the seamen could not claim to have a share in it. I entirely concur with Sir John Nicholl in saying, that, as against cargo, as cargo, the seaman can have no claim ; but as against the cargo where freight has been earned, and not paid, perhaps the case might be subject to different considerations, and I am particularly desirous of not concluding myself upon a point which may arise, namely, where the owner of the ship is the owner of the cargo, and the ship is wholly lost, but the cargo is saved. Though, technically speaking, there can be no freight payable, because there can be no freight payable by a man to himself, yet as the cargo would include in itself the value of the freight, I wish it not to be supposed that I am deciding upon that case, if ever it should arise. I do not at the present moment think it necessary to decide whether the wages are due to this mariner or not ; but I apply myself now to the second consideration, namely, as to whether or not I have jurisdiction to enforce this demand.

The question is, as it appears to me, what are the limits which have been prescribed to the jurisdiction of this Court ? I am not about to enter into a detail of all the preceding authorities in this Court or Courts of Common Law ; I think I may be safely relieved from so painful and so difficult a

task; for I am quite satisfied, that with whatever labour I might enter into the investigation, I never should be able to reconcile all the decisions. It will be sufficient if, from the more recent authorities, I am able to select enough for the guidance of my judgment, without entering into cases which occurred in former days, when perhaps they would not have received the same decision from any Court as they would at the present time.

MARCH 2.

Riby Grove.

The law upon this question is laid down in Lord Tenterden's book on Shipping.* The result is shortly this—that the Court of Admiralty, where the contract is in the usual terms, is entitled to exercise jurisdiction in the case—and that, though the contract be in writing, and under seal; but that, where the contract is special, or, to use the words I am about to quote, “If the contract for service be made upon terms and conditions differing from the general rules of law, the service alone cannot entitle a seaman to his wages; his right to them must depend upon the performance of the stipulated terms.” Now, that has reference to a fiction of ancient law—for the fiction was this; that this Court had jurisdiction upon the supposition that the contract was at sea, and the service was there performed; and in our Summary Petition it is alleged that the contract was made at sea. The passage cited, however, contains what I apprehend to be the result of all the authorities; that if a contract be a special contract, the Court of Admiralty is debarred from any jurisdiction over it. Now, unfortunately, what is and what is not a special contract, no one has attempted to define. What has been said is, that “a special contract shall oust the jurisdiction of the Court of Admiralty;” but in no one of the cases has there been an attempt to say what is a special contract; and here I am left entirely to the exercise of my own judgment. I am glad to see what Lord Stowell has done in a case of this kind—the only case that I am aware of—that of the “*Sydney Cove*,” and that was a case of very great peculiarity, because, in the first instance, a Summary Petition was given in, simply setting

What is a special contract.

The “*Sydney Cove*.”

* Shee's Ed., p. 4, c. 4, 3.

MARCH 2.

Riby Grove.

forth that the mariner was hired to serve as chief mate in a ship bound on a voyage to New South Wales, and afterwards on a whaling and sealing voyage, and back to the port of London, and was to have wages at the rate of £8 per month. That was the whole of the case. No objection was taken to the admission of the Summary Petition, and it was admitted as a matter of course. But afterwards, an additional article was offered, setting forth the particulars of the whaling and sealing voyage in which the ship was engaged, and alleging that the cargo sold for the net sum of £6,400, and that the chief mate was entitled to the twenty-fourth part or share of the net produce of the oil and skins. The admission of this article was opposed, on the ground that the Court of Admiralty had no jurisdiction in a partnership transaction, and various cases were cited. Lord Stowell ordered the case to stand over for consideration, and finding no precedents, he decided against the admission of the additional article. When the case came on, on the original Summary Petition, though the objection was then taken, Lord Stowell determined in favour of the mariner, but upon this special ground: he said that there was a considerable degree of obscurity, arising from the manner in which the mariner's contract was drawn up; but he thought the fair construction was, that the mariner was, at all events, entitled to monthly wages during the outward voyage; and that the whaling and sealing voyage was eventual only, being altogether dependent on Mr. Underwood, at New South Wales. Now I have caused search to be made for these articles, and I find that there is a special clause contained in them. After having adopted the common printed form then in use for wages, they went on to say: "It is further agreed that, after delivery of the cargo at Port Jackson, the ship is then to proceed a-whaling, or sealing, or both, or to take in freight for England, at the option of Mr. Underwood, the owner's agent, as he may think most beneficial to the owner, himself, and ship's company: and in case the said ship should go a-whaling, or sealing, or both, then the officers and seamen are to be on certain shares of the net proceeds of whatever the ship may procure: and if the ship

shall be freighted from Port Jackson to London, then the officers and seamen shall be entitled to the wages given out of the port of London at the time of their signing these articles: that the wages due on delivery of the cargo shall be paid there, deducting slops and advances." Now it is quite clear that Lord Stowell decided this case upon the principle, as he distinctly stated, that the voyage outwards was a voyage on the ordinary mariner's contract; and so it was, and the demand made in the original Summary Petition was simply for the wages, and Lord Stowell was perfectly right in making the distinction he did take, and in giving the mariner his wages, because he was only taking cognizance of that which was in the ordinary and common form: but with regard to the further demand of a share in the oil, Lord Stowell rejected that demand, and especially upon the ground that he did not possess any jurisdiction to enter into the question. I apprehend that, if the two cases had been so mixed up together that they were not capable of so clear and so entire a separation as that resorted to by Lord Stowell, he would, in pursuance of his own principle, have been under the necessity of rejecting the demand altogether; but finding, as he did, that he could separate the demand for the outward wages under the ordinary articles, and finding, as he states, that the whaling and sealing voyage was eventual only, and altogether dependent on the inclination of Mr. Underwood, he had a perfect right, on his own principle, to pronounce the decision he gave. The part of the decision which is important for the consideration of this case is, that, so far as related to the right to share in the oil, he considered that the special contract took it out of his jurisdiction.

MARCH 2.

Ruby Grove.

I now look to the contract in this particular case, for the purpose of considering whether it brings it within any of the principles adverted to either in Lord Tenterden's book or in the judgment of Lord Stowell. Let us see what the contract is. It begins by stating, that this agreement is made "pursuant to the directions of an Act of Parliament passed in the first year of the reign of her Majesty Queen Victoria." I am not aware of any such Statute.—[*Addams*. The present contract.]

MARCH 2.
Ribby Grove.

A special contract.

I cannot find such an Act.]—Nor can I. It goes on: “between Joseph Deane, the master of the ship *Ribby Grove*, of the port of Hull, and of the burthen of 240 tons, and the several persons whose names are subscribed hereto. It is agreed by and on the part of the said persons, and they severally hereby engage to serve on board the said ship in the several capacities against their respective names expressed, on a voyage from the port of Hull to Greenland, and seas adjacent, and back to the port of Hull; and the said crew further engage to conduct themselves in an orderly, faithful, honest, careful, and sober manner, and to be at all times diligent in their respective duties and stations, and to be obedient to the lawful commands of the master in every thing relating to the said ship, and the materials, stores, and cargo thereof, whether on board such ship, in boats, or on shore during the said voyage. In consideration of which services, to be duly, honestly, carefully, and faithfully performed, the said master doth hereby promise and agree to pay to the said crew, by way of compensation or wages, the amount against their names respectively expressed.” Now, let us see how it stands. First, having stated the quality in which each served, then follows the amount of wages per calendar month, and of course there are different sums according to the capacities of the individuals serving. Then come “hand-money in advance,” “striking,” “fish-money,” and “oil-money per imperial tun.” I must say, that it strikes my mind that this is, to all intents and purposes, a special contract; because, supposing I was to pronounce for the claim for wages, and to compel the parties to bring in the sum of £800, said to be received, in what way am I to go to work in order to apportion the shares of the seamen? I must decide upon the head-money in advance, whether money is due for striking the fish, upon what is called “fish-money,” and the shares they are to take for “oil-money per imperial tun.” And what am I to do besides? How am I, when parties become partners, under these circumstances, to decide as to the interest of the owners? Here is to be so much oil-money for oil per imperial tun. Could I decide that the persons on board this ship were to take the whole of that

which was saved, in total exclusion of the owners? that the owners are to lose the ship and all that belonged to them, and that the mariners are to be exclusively paid? Are they not partners in one and the same adventure? Would it not be a more equitable decision, to let in the whole parties to share, and to say that, in proportion to the amount which is due, or belongs to either of you, such is to be the division of the property saved? Why, this Court is utterly incompetent to enter into any such investigation.

MARCH 2.
Riby Grove.

I consider myself, therefore, bound to reject the Summary Petition on three grounds: first, this is a special contract, which special contract is described by Lord Tenterden as ousting the jurisdiction of the Court of Admiralty; secondly, because I am confirmed by the authority of Lord Stowell in so doing; and thirdly, because, this being in the nature of a partnership, the difficulties that I should have to encounter are such, that I should be afraid this Court would not have the means of arriving at a just and equitable result.

Petition rejected.

Proctors:—*Thomas*, for the mariner; *Buckton*, for the owners.

MARCH 10.

THE "WILHELMINE."—*Act on Petition.*—This was originally a cause of salvage by the master, owner, and crew of the *Robert Burns* steam-vessel, against the *Wilhelmine*, a Hanoverian galliot, in which the Court held that no salvage services had been rendered, and dismissed the foreign owner with his costs.* The costs, amounting to £106, not being paid, the Proctor for the pretended salvors was assigned by the Court to set forth his clients' names, with especial reference to the owners of the *Robert Burns*;† in obedience to which assignation, he brought in the register, whence it appeared that Mr. J. Robinson was the sole registered owner, against whom a Monition was issued and an attachment prayed; whereupon, Mr. Robinson alleged that he had

A Proctor, appearing for salvors, who were condemned in costs, being unable to set forth the names of some of his parties, held to be personally responsible for the costs.

* 1 Notes of Ca. 376.

† *Ibid.* 380.

MARCH 10. been no party to the action, which had been entered without his sanction or knowledge, and the Court, on that ground, dismissed him with his costs.* The Proctor for the *Wilhelmine* then moved for a Monition against the Proctor for the *Robert Burns*, in order to fix him personally with the costs, when the latter prayed to be heard on his petition against being made responsible.

ARGUMENT. *Addams, D.*, for the Proctor proceeded against.—This is a perfectly novel and an unprecedented proceeding, and the other party should assign very strong ground for so extraordinary an application. There should be some gross misconduct on the part of the Proctor to render him liable to the costs; and it is a question whether the Court has power to make him so. Every possible information was given as to who were the owners of the *Robert Burns*; the cause was described as a cause of salvage by the master and owners of the *Robert Burns*, "belonging to the Commercial Steam Packet Company," and the affidavit of Mr. Day represented him as agent of that Company, "the owners of the steam packet *Robert Burns*." If the owner of the *Wilhelmine* considered that no salvage had been rendered, he must have contemplated the condemnation of the salvors in the costs, and he should have called upon the opposite Proctor to exhibit a proxy, and if he did not, the party justly suffers for his *laches*. It is not usual to exhibit a proxy in this Court, but without a proxy no person can be held before it, any more than in the Ecclesiastical Court. Suppose a party before the Court not by proxy, and the Court should decree a Monition against him for the costs; would the Court enforce it against him? [PER CURIAM.—If he acknowledged the appearance by a Proctor, certainly.] It is stated by the Ecclesiastical Commissioners,† that "a party cited may either appear in person, or by his Proctor, who is appointed by an instrument, under hand and seal, termed a *prory*, the Proctor thus appointed represents the party, acts for him, and manages the cause, and binds him by his acts.—The party is represented, therefore, by a Proctor appointed

* 2 Notes of Ca. 19.

† Report, 1832, p. 15.

by virtue of a proxy, and I very much doubt the power of the Court to enforce such a Monition, and whether it is not bound to require a proxy. Proxies are not unknown in this Court, and there were particular reasons why there should have been a proxy in this case: the ownership was in a body, not an individual. The Proctor for the salvors could not set forth all the names of the Company; but suppose he had set forth the names of all the shareholders, would the Court decree a Monition against fifty or sixty persons for the costs? I submit that a party is not regularly before the Court unless he appears personally, or by Proctor "lawfully constituted," that is, by proxy.

MARCH 10.

The Wilhelmine.

Haggard, D., for the foreign owner.—Although, regularly, proxies ought to be required in this as in the Ecclesiastical Court, the practice of requiring proxies has been abandoned in the Court of Admiralty for a long period. The action was entered on behalf of the master and owners of the *Robert Burns*. The Proctor states that he is unable to set forth the owners' names; till he does so, in obedience to the direction of the Court, he is responsible for the costs in which they were condemned. The assignation of the Court is not complied with; the Proctor's inability to comply is alleged, but as he has not shewn that he was authorized by the owners to commence the suit, he is personally responsible. The responsibility of practitioners in this Court is analogous to that in other Courts, and we know that the power of condemning their practitioners in costs has been exercised. *Wright v. Castle*.^{*} *Wilson v. Wilson*.[†] *Wade v. Stanley*.[‡]

Harding, D., on the same side.—The Proctor, on his own shewing, is personally liable; for he has either proceeded without sufficient authority, or he is still withholding the names of his parties.

[Further authorities cited:—"The Frederick;" § *Gynn v. Kirby*; || *Ruthin (Burgesses of) v. Adams*; ¶ *Hall v. Bennett*.^{**}]

^{*} 3 Meriv. 12.

[‡] *Ibid.* 674.

|| 1 Stra. 401.

^{**} 2 Sim. & St. 78.

[†] 1 Jac. & W. 457.

§ 1 Hagg. A. R. 219.

¶ 7 Sim. 345.

MARCH 10. *Addams*, on the cases.—These were not cases of proceedings which went on to the end, and the parties were condemned in the costs ; but where the objection was raised in the first instance to want of authority.

JUDGMENT. DR. LUSHINGTON.—In this case, very serious questions have been mooted with regard to the practice of this Court, its course of proceeding and its power of enforcing its decrees. Were it necessary finally to decide some of these points, perhaps I might deem it requisite to take further time for consideration ; but I do not apprehend that the decision of the question now before me will necessarily involve the determination of any point of great doubt or difficulty. I regret, indeed, that this question should ever have been mooted, and that the discussion has taken place ; because I believe that such discussion must be detrimental to the best interests of the profession, and because it also relates in some degree to the personal conduct of an experienced and respectable practitioner. Nevertheless, I must address myself to the question, and determine it according to the best of my judgment, in the manner which the justice of the case requires.

Practice of this Court. Before I enter into any of the circumstances of this case, it becomes requisite that I should briefly advert to what is the course of practice with regard to appearances in the Admiralty Court, especially in cases of this nature. It is no doubt true that, according, perhaps, to the ancient, the very ancient, practice of the Court—so old that I believe it is not within the memory of man, and no trace can be found in my reading—generally speaking, the rules for appearing in the Court of Admiralty were the same as in the Ecclesiastical Courts ; but, for the convenience of parties, probably for not less than 200 years, the established rule and custom has been for Proctors to appear on behalf of parties, without being called upon to exhibit any proxy ; whereas, in the Ecclesiastical Courts, that is considered to be an indispensable practice.

Duty of a Proctor without proxy. The first question, then, which I must consider is this: what is the duty and the responsibility attaching upon a Proctor who so appears without giving a proxy ? I appre-

hend that this Court has a right to require, as every Court must have, for the purpose of preventing illusory suits and unauthorized litigation, that the Proctor, when he does appear either for plaintiff or defendant, shall be authorized by some person who has an interest in the cause at stake, or that he should have a justifiable and strong ground for believing that the individual has such an interest. That, I apprehend, is his duty; and further, that at any period of the cause, and at any time before the cause is dismissed out of Court, the Court has a right to call upon that Proctor to state—not generally, but specifically, by name—the whole of the parties by whom he is authorized to appear. Were it otherwise, the inevitable consequence might be this: that Proctors might appear for individuals who either were not in existence, or for persons who had given no authority, or for individuals assuming the names of others who might take the benefit of the result of the suit, without at any time being obnoxious to the consequences of defeat.

But it has been argued that, though it may be true that a proctor would have been bound to exhibit a proxy, on the demand of the Proctor on the other side, or to set forth specifically the names of the parties who authorized him to give an appearance in the cause, yet the Proctor for the party proceeded against ought to have made that demand at the time, and that he is prevented from taking the objection afterwards. I am decidedly of a contrary opinion, and for this plain and obvious reason: because it would be contrary to the established course of practice in this Court; for I know of no instance within my recollection (though there possibly may have been one or two that have escaped my memory), in which the Proctor for the party proceeded against has ever called upon the Proctor for the other party to exhibit that proxy, and most certainly the records of the Court demonstrate that the so doing would be contrary to ordinary practice. I never can think, unless there be peculiar and extraordinary circumstances in the case, that a Proctor can be to blame for following the ordinary and accustomed practice of the Court, a course which must be taken to have been sanctioned by the Court itself, and upon the present occasion,

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MARCH 10. not sanctioned simply by myself, but by all my predecessors, so far back as recourse can be had to their judgments.
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Now, are there any extraordinary circumstances in this case? It is said that this action being for salvage, and salvage being altogether denied, a decree for costs might possibly be demanded, and therefore the precaution ought to have been used. Why, there is scarcely a case of salvage which, if this be the doctrine, would not afford the same pretext for the Proctor for the owners to demand the production of a proxy. There is not a case of collision which would not afford the same pretext, and if I were to sanction the argument now adduced, that it is the duty of the Proctor who appeared on behalf of the owners to demand a proxy, I must go a great deal further, and say that, in every case whatever in which a party presses that the other party be condemned in costs, the Proctor for the owners must demand a proxy; and the consequence of that would be—as is most clear and palpable—to embarrass the proceedings of this Court to an extent difficult to conceive; to occasion infinite expense to suitors, and indeed to deter them almost from resorting to this Court at all. I am of opinion, therefore, that the Proctor for the salvors in this case was bound to be prepared with the names of those who authorized him, at any period whatever, and I am of opinion, also, that there was no *laches* or neglect on the part of the Proctor who appeared for the owners, in not demanding a proxy, and in not requiring the names to be set forth.

Now, having stated my opinion upon this part of the case, I cannot refrain from adverting to a topic which has been strongly pressed in argument, and which is of very great importance, though perhaps it may not require an immediate decision at my hands: but I do not wish that for a moment a shadow of doubt should exist as to the course I shall pursue if any such case should occur—I mean in any cases which have been decided, and in the case about to be decided. If a party, having authorized a Proctor to appear for him, and no proxy having been demanded, should be condemned in costs, and it should be alleged as an excuse against my proceeding to enforce the

sentence that he had not given a proxy, I would attach him, and leave him, if he thought that attachment was not according to the due course of law, to resort to some other Court for the purpose of obtaining redress. This, I am sure, would be the consequence of refusing to pursue such a measure—namely, the grossest injustice would take place. For what would be the inevitable consequence of holding back the exercise of the authority of the Court under the circumstances I have stated? An individual, knowing that a cause was about to be commenced, would give his authority to a Proctor, who entered into the litigation; would take the benefit of the decree; and if it should happen that that decree turned out to his detriment, he would be in a situation to turn round upon a Court of justice and defy the exercise of its power to do justice to the other party. I do not believe such to be the law or practice of this Court. I understand that the established practice of this Court allows a Proctor, on his own responsibility, to produce his parties when he is called upon to commence or defend a cause, without producing a direct authority. I believe that this is the law which the Court is bound to enforce, and I should be most reluctant to alter the practice, by requiring the production of a proxy, because it is clear to every one who now hears me, that such an alteration of the practice would not only be injurious to the suitors, but utterly destructive of the proceedings in this Court. The benefit of proceeding in this Court is, that it is summary, expeditious, and inexpensive.

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With regard to the case itself, it is not necessary to go through the original proceedings. It was an action for salvage, and Mr. Addams appeared for the salvors, and for the owners of the vessel claiming salvage. I was of opinion that no salvage was due; that the claim was neither just nor equitable, and I considered myself bound to pronounce the decree which I did pronounce. That decree was to condemn the alleged salvors in the costs, and, the costs being taxed, payment was demanded. In terms, the decree condemned the master and the owners, corresponding with the terms in which the action was entered.

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First, I apprehend that, in point of law, all the parties so condemned in costs are equally responsible for the whole or any part. When I consider what the probable circumstances are of a master or mate of a vessel of this description, it is quite impossible that they would be capable, according to ordinary experience, of obeying a Monition against them to pay the costs. Under ordinary circumstances, it would rather be considered vexatious to proceed against persons in their condition of life, and not against the owners, who are infinitely more responsible in point of pecuniary resources, and equally responsible in point of law.

Proceeding of
 the Proctor.

When the owners of the vessel salved were determined so to proceed, Mr. Addams was called upon to set forth the names of his parties, the owners of the steam-vessel *Robert Burns*. I may observe, with regard to the institution of the suit, it is stated, in the Act on Petition, to have been commenced by Mr. Addams "in the usual and customary form." I have no reason to doubt that the suit was commenced in the ordinary manner, and with the ordinary authority with which a Proctor is clothed in commencing a suit of this description. I attribute not the slightest blame to Mr. Addams for having so commenced the suit; but I cannot, therefore, divest him of the responsibility which I consider the law attaches to every Proctor who appears in a suit of this description—namely, the responsibility of setting forth who are his actual parties. I regret, however, to say that, when Mr. Addams was called upon to set forth the names of his parties, he took a course which, in my judgment, was neither prudent nor advisable. The Surrogate was prayed to assign Mr. Addams to set forth the names of his parties within three days, otherwise to decree a Monition against him for the payment of costs. Mr. Addams objected thereto, and prayed to be heard on his petition. This not having been done, on the 29th June, I assigned him to do it by the 5th July. I think Mr. Addams's course ought to have been this—to have set forth the whole circumstances which led to the commencing the suit, at the earliest moment; to have given the names of the agent or agents who authorized him to appear, and to have stated that he be-

lied them to be the agents of the Commercial Steam-Packet Company, or any other Company, whatever it might be. If he had done so, and added that he had considerable difficulty in ascertaining the names of the Company, it would have been open to the Court to consider what measures to adopt before proceeding further. I think there may be very great difficulty in proceeding against Companies, especially those not chartered, and in obtaining the names of all persons composing them; but I am not disposed to allow the Court to be hampered with that difficulty. Mr. Addams may enable me to do this: if I can find that the chairman, or director, or the secretary, of the Company, has authorized an agent to act on behalf of the Company in salvage cases, and to employ a Proctor, and if the Company have consented to the act, I will send out a Monition against that individual, and let him relieve himself from the effect of it, if he can shew that in law he is not liable. But the Court was left no alternative; it was called upon to do justice, and I had no person before me against whom I could proceed; the Monition of the Court became a mere *brutum fulmen*, and the foreign owner was without a remedy. I regret to say that the same line of conduct was pursued in a manner which led to still further expense. When I assigned Mr. Addams, on the 29th June, to set forth the names of his parties, on the 5th July, in obedience to the order of the Court, he brought in the register of the steam-vessel, from which it appeared that Mr. Robinson was the owner; but on a Monition being issued against him, the proceeding was utterly nugatory; he had not given any directions or instructions, by himself or his agent, to commence the action, of which he was ignorant, and it was within Mr. Addams's own knowledge that the registered owner had never given him, directly or indirectly, any directions to take proceedings. If Mr. Addams, on the 5th July, had stated the exact circumstances to the Court, I should have been as anxious as any man could be to have saved him from the consequences.

It has been said that there is no precedent for the course which the Court is about to pursue. I must say, I am most thankful that there is none, and I trust that this is and will

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Absence of
precedent.

MARCH 10. be an isolated case, and as none have preceded it, so none will follow. There is not, I think, within the recollection of any practitioner of the Court, and certainly not within mine, any case of a Proctor being called upon to set forth the names of the parties who authorized him to proceed, and being unable or unwilling to do so. Consider for a moment what would be the consequences of the Court bringing its hand. Here is a foreigner, accidentally coming into this country, who is unjustly charged (as the Court has decided) with the payment of salvage which is not due, exposed to long detention, and subjected to much vexation and expense. The only indemnity awarded to him by the Court is the actual costs incurred in this Court. Now, what a disgrace would it be to the character of the nation and the administration of justice, if foreigners resorting voluntarily or compulsorily to these shores were to be told that this Court had no power to enforce its decrees; that, after suffering wrong, they were to go without redress!

The Proctor
condemned in
the costs.

I must say, that I think it my duty, under these circumstances, to condemn Mr. Addams in the original costs; the costs incurred by citing Mr. Robinson, the registered owner, which I think were most unnecessarily occasioned by the Proctor not coming forward and stating the actual circumstances of the case; and the costs of resisting this petition, because I think no justifiable ground has been laid for refusing the prayer of the Proctor on the other side.

Proctors:—*Deacon*, for the foreign owner; *Addams*, for the salvors.

Prerogative Court of Canterbury.

MARCH 14.

A will, referring to a disposition contained in a former will, thereby revoked,—probate of such

IN THE GOODS OF CATHERINE SINCLAIR, WIDOW, deceased.—*Motion, ex-parte*.—The deceased died 18th November, 1842, having executed a will, with a codicil thereto, dated 7th June, 1841, appointing A. G. and T. J. executors. In the will there is a reference to a former will, in the following

reads:—"And whereas J. C. and W. S., my son and daughter have both departed this life since the date of my last will and testament; now I do hereby give the share of my estate and effects, which would have fallen to them, if they survived me, to the respective children of my son and daughter; that is to say, the children of my late son to their parents' share equally amongst them, share and share alike, and the children of my late daughter in like manner." And in the codicil the bequest to the children is referred to. The deceased, on executing her will and codicil, delivered to T. J., one of the executors, then present, a paper which she said contained her former will and codicil, and directed him to destroy the same. The former will was dated 16th January, 1834, and the codicil of the date 11th May, 1839. From the time of the former will and codicil being delivered to T. J., till some time after the death of the deceased, he was under the impression that he had destroyed them, until, being required by his professional adviser to ascertain the fact, he made search and found them. The last will revoked all former wills and codicils.

MARCH 14.

Sinclair, dec.

former will,
with the later,
refused.

Jenner, D., moved the Court to give directions as to whether, on granting probate of the last will and codicil, the former will and codicil, or either, should be included, as containing instructions to the executors as to the amount of the shares to which the grandchildren were entitled.

Feb. 3.
Motion.

SIR H. JENNER FUST.—I will not take upon myself to give directions whether such papers are to have probate or not, on an *ex-parte* motion. The first two papers are revoked by the later instruments, and in referring to them, the deceased must have supposed that they were both destroyed. They were, however, not destroyed; they are forthcoming, and were therefore in existence at the time they were referred to by the deceased. The question is, whether the Court can take them as forming part of her will. I shall give no directions. The party must act under the advice of Counsel. The other parties are not before the Court.

Motion re-
fused.

Jenner now moved for probate of the will and codicil with the part of the old will referred to.

March 14.
Motion.

MARCH 14. **SIR H. JENNER FUST.**—I have no doubt about decreeing probate of the will and codicil ; but I do not see how I can decree probate of the old will, in the face of the revocatory clause. I reject the former will, and decree probate of the will and codicil, as they now stand. I think the construction of the Court of Chancery will be, that the children are entitled to their parents' shares.

Sinclair, dec.

DECREE.

Motion refused.

W. G. Clarkson, Proctor.

Attestation. **GAZE AND GAZE v. GAZE AND OTHERS.**—*Cause.*—This was a business of proving in solemn form the will of William Wiseman, who died 25th September, 1842, by George Gaze and Charles Gaze, the executors named therein, against John Gaze and others, the nephews and nieces of the deceased, and only persons entitled in distribution to his personal estate in case he had died intestate. The Allegation propounding the will pleaded that the testator with his own hand wrote the will in question, and on the 21st April, 1842, the day it bore date, duly executed the same, by writing his name, or acknowledging his name then already written, in the presence of three witnesses. The property was of the value of £1,700, consisting principally of leasehold houses, which by the will are given to the nephew, John Gaze, subject to an annuity to a niece. The evidence of the attesting witnesses, in support of the Allegation, was to the following effect :—

Evidence.

William Wood, a shoemaker and tenant of the deceased, deposed that, on the morning of the 21st April, 1842, the deceased, who was an old gentleman, called upon him, accompanied by his fellow-witnesses, Thompson and Marshall, and asked him to accommodate him with the use of the table in his parlour; that witness assented, and raised one of the flaps of the table, when the deceased thereupon placed the paper on the table folded up; that, sitting down at the table, he took from his pocket a bottle of ink and also a pen, unfolded the lower part of the paper on the table keeping the upper part folded, so that the witnesses could not see the writing in it; that he then wrote "a something" on the paper but what witness could not say; that the deceased lifted up the

folded part of the paper to write what he so wrote, which he wrote at the left-hand side of the bottom of the paper; that what he thus wrote was only a word or two; that he then took a volume of the *Penny Magazine*, which lay on the table, and placed it over the rest of the paper unfolded down, so as completely to cover it and prevent their seeing what was written on the paper; that the deceased then got up and sat in another chair at the end of the table, and asked witness "if he would sign his name" on the paper 'underneath his own," and he accordingly signed his name underneath the deceased's name, which he observed prefixed on the lower part of the paper, for there was no other part visible; that the part where he observed the deceased's name was the middle of the paper, as near the centre as might be, and about three or four inches from the bottom, and at a different part from that where he had seen the deceased writing on the paper, which was near the bottom, but in the left-hand corner; that his two fellow-witnesses then signed their names underneath the deceased's name and his own, the deceased having asked them so to sign their names; that what the deceased then wrote on the paper, he wrote in the presence of all the three witnesses, who signed their names in the presence of the deceased and of each other; that the deceased did not tell them it was his will at the time; that witness did not see the deceased write any part of the writing except the ending word or two in the corner; that he perfectly remembers the seal on the paper, and that the names of the deceased were written on either side of the seal, when he (witness) signed it; he was satisfied that they were not written on the will by him in his presence, for what he wrote he did not write near the seal, but in the left-hand corner, where the date, "April 21st," appeared; that, to the best of the witness's recollection, the deceased, when he asked witness to sign his name, pointed to that part of the paper where it was folded—that is, where his name was prefixed and asked him "to put his name underneath his own name, one name on one side and the other name on the other side;" that he cannot depose precisely to the exact words he used, but his meaning was, that witness should sign one of his names on one side of where the seal is, and the other on the other side.

Upon interrogatory, the witness deposed that he had, since the deceased's death, declared, as the truth is, that the deceased did not sign his name in the presence of the witnesses, or acknowledge his name or signature, as having been written or signed to the will, in witness's presence, for he did not do so formally, any further than by asking him "to put his (witness's) name

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MARCH 14. under his (deceased's) name; that the deceased's signature was not placed to the will by any person for him or by his direction, in the presence of the witnesses; that the deceased did insert the date in the will, in witness's presence; that the deceased was, during the whole of the time of witness's being in his presence, in a state of nervousness—he was so to the greatest extreme—dreadfully so—so as to be more fit to be in bed than out; that the witness verily believes that the deceased could not then have signed his name in the firm character of handwriting in which it appears on the will; that his hand trembled very greatly indeed during the whole time.

Gaze v. Gaze.

George Marshall, bricklayer, deposed that he was at work for the deceased on the 21st April, 1842, on the forenoon of which day he received a message from the deceased that Thompson and he were to go to the deceased at Wood's house; that witness immediately proceeded thither, and they all three went into Wood's parlour together; that while witness had been alone with the deceased, before Thompson joined them, he had told witness that he was going to sign his will, and that he wanted him (witness) to sign it—to the best of his recollection deceased then told him that, but he cannot be quite certain; that, as soon as they got into the parlour, the deceased took out of his pocket a handkerchief, unfolded it, took the will out of it, and laid it on the table; that he unrolled part of the paper only, and laid a book upon it, so that witness could not see the writing thereon; that the deceased then asked Wood to sign his name to it; that the deceased did not sign it himself first, he wrote "a something" on the paper, but witness did not see what it was; Wood signed first, and witness signed under Wood's name, the deceased asking him so to do, and pointing out the place where he was to sign; that witness did not see the writing on the paper, or know that it was a will by the deceased's mentioning such to be the case in Wood's parlour; that he saw the deceased with a pen in his hand write something on the paper, but cannot say whether he signed it or not, or what it was he wrote; he has no recollection whatever of the deceased's having acknowledged his signature; that the whole transaction occupied but a few minutes, and the witness did not pay much attention to it; that he recollects the deceased's asking Wood "to write his name underneath his," and that, before he did that, he had the pen and ink in his hand, and wrote "something" on the will.

Upon interrogatory, this witness deposed that he was too far off to see what the deceased wrote on the will, but he is certain that his fellow-witnesses were close enough to see it; that the signa-

not placed to the will by any person for the deceased, in the presence; that the deceased, after writing "something" will, said he had written the same very badly, or to that effect, that he was, during the whole time, in a state of nervousness, and was all of a totter altogether—his hand trembled very

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James Thompson, bootmaker, deposed that, on the 21st 1842, the deceased sent to tell him and Marshall to go to his house, whither they went, joining the deceased before they entered the house; that when they went into the parlour, the deceased pulled out the paper from a handkerchief and laid it on the table, doing the lower part of the paper only, laying a book on the upper part; he then said he wished them to put their names to some of that paper; he had a pen and ink with him, and he then took the pen in the ink and wrote on the left-hand corner of the paper the words "21st April," and directly he had done so he said, "Drat it! I have done it bad;" that he then proceeded "to put his name underneath his, where the seal was," and after that, he and Marshall signed, the deceased putting his finger down and pointing to each of the witnesses the exact place where they were to sign; that he would not say that the deceased used the words "my name" or the words "the seal;" he said, pointing to the proper place, "Put your name underneath, here," or "Put your name down here full," or "Put your name underneath my name, here," the place he pointed to, of course, underneath his own signature.

In the interrogatory, this witness stated that the deceased did not sign his name or acknowledge his signature in the presence of himself or his fellow-witnesses, further than by telling some one of them, "to put their names underneath his," and that the witness saw the deceased's signature on the will, the part folded down did not cover that; the witness should say that the deceased could not have signed his name in the character in which his name appears, for even when he wrote, his pen trembled in his hand all the time.

James D., for the executors.—It is admitted on all hands that the testator did not sign the will in the presence of the witnesses; the only question is, whether he acknowledged his signature in their presence, and this question depends upon the Court's construction of the Will Act; whether the Court will lay down this rule, that there can be no such acknowledgment of his signature by a testator,

ARGUMENT.

MARCH 14. unless he shall say, in so many words, "This is my name and I acknowledge it to have been written by me."]
Gaze v. Gaze. the Court will not lay down such a rule, and if so, it cannot be contended that there was not in this case a sufficient acknowledgment in the presence of witnesses present at the same time. It is apparent that the witnesses come forward (not meaning to depose untruly) with an *animus* against the will; but the witness Wood says, "He asked me if I would sign my name underneath his own, and I accordingly signed down and signed my name underneath his name, which was saw prefixed on the lower part of the paper." Therefore this case is not like that of *Holt v. Genge*,* where the witnesses did not see the name of the deceased when they tested the will.

Jenner, D., for the next of kin.—There is no evidence that the signature is in the handwriting of the deceased, and under the 9th section of the Act, I submit that, if the signature be made by any other person than the testator, that person must be produced, to shew that it was done "in his presence and by his direction." These words are superfluous, unless the Act requires proof of the fact, to shew that, *prima facie*, the testator had a knowledge of the contents. If a testator signs the will himself, he must do it in the presence of witnesses, or acknowledge that he has signed it, in the presence of witnesses. If he deposes another person to sign for him, it must be proved that it was signed in the testator's presence and by his direction. [PER CURIAM.—Is there any reasonable doubt that this is the deceased's signature? In your answers, you do not deny that it is his writing.] In the 20th section of the Act, the same words also appear with reference to the destruction of a will. I apprehend that, if a testator were to direct a person to burn, tear, or destroy his will, unless it were done in his presence, it would have no effect. [PER CURIAM.—The only doubt is, whether the Court should rescind the conclusion of the cause to admit evidence of the handwriting—*Addams*.—It is clear that the testator inserted the date: therefore, he could write.]

* 1 Notes of Ca. 572.

MR H. JENNER FUST.—I have no doubt that the testator
 nt to acknowledge his signature, and that, in fact, he
 so, by desiring the witnesses to sign their names under-
 h his name, he having signed it before. I think I am
 ified with the case as it is.

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Gaze v. Gaze.

JUDGMENT.

The evidence before the Court is, that the deceased told
 of the witnesses that “ he was going to sign his will.”
 ppears that, when they came to the house of one of the
 nesses, the deceased having produced the will, added to
 he date, not the year, for I take it that that was not in-
 ted at the time of execution ; therefore, the will,—the body
 the will, which is of considerable length, and appears to
 in the handwriting of the deceased, and disposes of the
 ole property,—was produced by the deceased himself, and
 desires the witnesses “ to put their names as witnesses to
 will,” and he told the first witness “ to put his name
 ler his name.” There can be no doubt, therefore, as to
 intention of the deceased that it should be considered as
 will, and should have effect ; and the only question is,
 ther there is sufficient evidence that he did acknowledge
 signature in the presence of witnesses ; and, if he did,
 ther the signature is in his own handwriting, or made
 ome other person not produced as a witness in the cause,
 a sufficient attestation within the Statute. Now, I can-
 help considering that it would be going too far—that it
 ld be a hypercritical construction of the Statute—to say
 there was not an acknowledgment of his signature, and
 e is no evidence that the signature is not in the de-
 ed’s handwriting, except that the witnesses say he was
 such a nervous trepidation, that he could not have
 ten the signature as it appears on the will. But I do
 think there is any reason to doubt that it is his signa-
 e, notwithstanding that there does appear some difference
 he writing, though not sufficient, in my opinion, to call
 further evidence as to this point, and I do not, therefore,
 ak it necessary to rescind the conclusion of the cause in
 er to admit such further evidence.

No doubt of
intention.An acknow-
ledgment of sig-
nature.

Upon the whole, I am satisfied that this is a case in which
 bate of the paper may pass, as being duly executed

Probate
granted.

MARCH 14. according to the provisions of the Statute ; and I also think
Gaze v. Gaze. (the question being created by the act of the deceased), that
 the other party's expenses should be paid out of the estate.

Proctors:—*Pownall*, for the executors; *Fox*, for the next of kin.

MARCH 17.

Three testamentary papers, unattested, dated posterior to the Will Act, propounded as further codicils to a will dated prior to the Act, and probate prayed, on the grounds that the will gave effect to codicils which the testator might thereafter make, though unattested; and that they were confirmed by a subsequent codicil.—Allegation propounding the papers rejected.

THE COUNTESS DE ZICHY FERRARIS v. THE MARQUESS OF HERTFORD AND OTHERS.—*Allegation*.—The Marquess of Hertford, the deceased in this cause, died on the 1st March, 1842, in England, having executed a will and a great number of codicils. The will is dated 25th January, 1823, and the codicils bear various dates between that year and the period of his death. Some of the codicils are in the testator's handwriting; they are signed with his title of honour, and some of them are attested by three witnesses; but three of the codicils, dated subsequently to the 1st January, 1838 (when the Will Act came into operation), are unattested. Probate of the will and of the codicils (twenty-nine in number) dated prior to the 1st January, 1838, and one dated in 1839, which was duly attested, was granted to the executors, Lord Lowther, Mr. Croker, Mr. Hopkinson, Mr. Horsley, and Captain Meynell. The three unattested codicils, made since the 1st January, 1838, are dated respectively 28th October, 1838, 13th August, 1839, and 20th March, 1840, and are in the testator's handwriting. Four of the executors (Lord Lowther, Mr. Hopkinson, Mr. Horsley, and Captain Meynell) declined to propound these papers, but were willing to take probate of them if the Court should be of opinion that they were entitled thereto, and they were therefore, no real parties to the suit, which was promoted by the Countess de Zichy Ferraris and Mr. J. W. Croker (one of the executors), who are legatees to a considerable amount named in the codicils, against the present Marquess of Hertford, the residuary legatee, who opposed the grant of probate of the three papers. The Countess and Mr. Croker appeared by separate Proctors and Counsel, and each had

a separate Allegation. Mr. Croker joined in proving the paper of 28th October, 1838; the Countess repounded the other two papers. Their Allegations substantially the same, and had the same object—, to state the circumstances under which it was concluded that the papers were entitled to probate, though not according to the provisions of the Will Act. The substance of the papers are as follow:—

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Whereby give and bequeath to Charlotte Countess of Zichy The Codicils, to be held by her for her own sole and separate use, the shares of which I may die possessed in the United States which now, I believe, exceed three thousand. Milan, Oct. 18th, 1838. HERTFORD.

Also give and bequeath to my friend, Rt. Honble John Croker, all my stock and shares in the Virginia United Stock, which, I think, are one hundred thousand dollars. ORD. Oct. 28th, 1838. Milan.

This is a Codicil to the last will and testament of Francis Lord Hertford. For several years, I have thought of and have altered my decisions about the Regent's Park, but as my youngest ward is about forming an excellent match, and to lose my two very old four-legged friends, it becomes me to do so I give my leasehold house and premises and all it containing plate and two old entailed pictures by Canelletti, to Charlotte Countess Zichy Ferraris, and to her heirs and assigns in testimony of which I sign this codicil, this thirteenth day of March 1839. HERTFORD.

And copy, similar but not copied *verbatim*. H.

I have also one thousand pounds of Long Annuity, which is for about thirty years longer: this I give and bequeath to Charlotte Zichy Ferraris, my ward. And I declare this a codicil, formed part of my will and testament. May 20th, 1840. ORD.

Allegation of the Countess de Zichy Ferraris pleaded as follows:—

That the testator, by a clause in his will, gave and bequeathed Allegation. of his personal estate and effects which he had not by any codicil or testamentary writing, confirmed by his will, disposed of specifically, or which he had not by his will, or should any codicil or testamentary writing dispose of specifically,

MARCH 17. to his executors upon trust, to dispose of the same, in the following words:—"And pay, satisfy, and discharge all the several legacies and annuities given and bequeathed by this my will, or such codicils or testamentary papers as aforesaid, or which I shall or may give or bequeath by any codicil or codicils hereto, or by any testamentary writing or writings under my hand or signed by me and whether witnessed or not, and do and shall stand possessed of and interested in all the surplus or residue of the said monies in trust for my said son, Richard Seymour Conway, Earl of Yarmouth, his executors, administrators, and assigns: provided always, and I do hereby declare my will and mind to be, and I hereby direct, that my said son shall, upon receiving from my executors hereafter named, or the survivor of them, or the executors, administrators, or assigns of such survivor, a request for such purpose in writing, within twelve calendar months from my decease, forthwith, with all convenient expedition, make, do, and execute all such acts, deeds, matters, and things as may be required of him, and in his power to do, for giving full effect to every appointment, direction, devise, or bequest in this my will, or in my codicil or codicils, or other testamentary writing which I have already heretofore made and may be now subsisting, or may now or hereafter make, and for giving full effect to any bond or instrument, or written promise which I have executed and signed, or may hereafter execute and sign, and which shall be subsisting at my decease for the purpose of securing any principal or annual sum of money or in favour of any person or persons whomsoever, and in case my said son shall neglect or refuse to do so, I hereby declare and direct that the bequest and trust hereinbefore made and directed as to the surplus of my residuary personal estate, and of the surplus of the sum of £47,000 and interest to and in favour of my said son, shall be absolutely void: in such case, I direct that the surplus of my residuary personal estate shall be paid to the Commissioners for the time being appointed for the Reduction of the National Debt." That at the conclusion of the will, the deceased ratified and confirmed his will and codicils in the words following:—"And hereby revoking all former wills, but ratifying and confirming all codicils and testamentary papers as aforesaid, which I wish to be considered as if incorporated in this my will, I declare this to be my last will and testament." That being resident at Milan, a city in the Austrian dominions, and subject to the laws, usages, and customs of Austria, in which city the testator had a house and an establishment, he executed the codicil of 28th October, 1838, and intended that it should form part of and be incorporated with his

will, and that he executed the same in conformity with the laws, customs, and usages, and in the form required and observed in making testamentary dispositions in, the Austrian dominions, as required for a further codicil to his will; that the codicil is good and valid according to the laws of Austria; that by a codicil of 26th April, 1839 (of which probate had been granted), the testator ratified and confirmed his will and codicils," and amongst others, the codicil of 28th October, 1838; that the codicil of 15th August, 1839, was intended by the testator to form part of and to be incorporated with his will, and that, on the 8th November, 1839, he duly executed a further codicil, in the presence of witnesses, and that he also intended that the codicil of 20th May, 1840, should form part of his will, and be incorporated therewith.

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Mr. Croker's Allegation pleads in addition that the stock, shares, goods, or property bequeathed by the codicil of 28th October, 1838, was, at the time of making it, and is now, locally situated in the United States of America.

Jenner, D., for the Marquess of Hertford.—The question is, whether either of these Allegations is admissible. The first of the papers is propounded by Mr. Croker as well as the Countess Ferraris, and the object of both their Allegations is to apply the law of Austria to that paper, as made at Milan; if that should fail, by means of certain words in the will of 1823, to incorporate with it a paper not made in 1838; if that should fail, it is proposed to make certain words in a codicil of April, 1839, ratifying and confirming the will and codicils, republish the paper of 1838. With regard to the first point, although it is pleaded that the testator was resident at Milan, a city subject to the law of Austria, it is not pleaded that he was subject thereto, and that that law was obligatory upon him. The testator was a domiciled subject of England, though resident at Milan, and it is a new thing to come to this Court and ask it to pronounce for a paper not valid by the law of England, on the ground of its validity according to the law of Austria, the testator being a domiciled Englishman, the property locally situated in the United States of America. As to the locality of the property, personal property has no locality; it accompanies the person, and the succession to it is governed by the *lex domicilii*—the law of the country where the tes-

1842.

Dec. 5.

ARGUMENT.

MARCH 17. tator was actually domiciled. This is a settled point. The next object is to make a passage of the will of 1823 incorporate the paper of 1838. It may appear by the language of the will that the deceased contemplated a possibility of his making codicils without formally executing them, but he had held a kind of penalty over his residuary legacies, but it is impossible to contend that, in making a will in 1823, he should have contemplated the ratifying and confirming papers not made till fifteen years after. It is difficult to say what was the intention of the testator in making these bequests to Mr. Croker and the Countess of V. I am not to argue this as a question of intention, but whether the requisites prescribed by the Statute of 1793 are complied with or not. I find it decided in all the cases that, to incorporate one paper with another, the paper incorporated must have been in existence at the time, and must be distinctly referred to and identified, so that there can be no mistake; it must be, as Lord Eldon expressed it, "within the sheets" of the will. *Habergham v. Vincent*.^{*} *Smart v. Prujean*.[†] *Boydell v. Drummond*.[‡] *Wilkinson v. Adams*.[§] *Shortrede v. Cheek*.^{||} *Dillon v. Harris*.[¶] Then is this paper, which was made at Milan, in October, 1838, referred to in any subsequent codicil? It is pleaded that, by the codicil of April, 1839, which is duly executed, the testator confirmed the codicil of October, 1838. The codicil of April, 1839, begins: "This is a further codicil to the will, testament, and codicils of me, &c.," and it ratifies and confirms his "will and codicils." But the question is, whether he meant to confirm the will and codicils duly executed only, or to include codicils (so called) simply signed by him, and therefore invalid. It appears that it would be forcing his language to suppose that he meant to confirm all codicils, good and bad. The word "codicil," *per se*, must mean "good and valid codicil," as the word "children" means in construction of

* 2 Ves. jun. 204.

† 6 Ves. jun. 565.

‡ 11 East, 141.

§ 1 Ves. & B. 422.

|| 1 Ad. & E. 57.

¶ 4 Bligh, N. C. 321.

e children. If this had been the only codicil, it might have been a different thing; but as there are other codicils, it is clear he did not confirm all. The other paper propounded, dated in August, 1839, is simply signed, and this is followed by another, dated in November, 1839, duly executed, which said, virtually confirms the other; I apprehend, that is not the case under the present Act. As a codicil was made and duly executed, there was another, dated in May, 1840, signed only, and this was incorporated with the will of 1823. It is for the court to decide whether the testator meant by the term "confirm" not merely codicils well executed, but all executed at all.

But, D., on the same side.—The question of doctrine the first of these papers, is settled by the case of *Forbes v. Forbes*,* and other cases. But an attempt is made to insert into the will a subsequently executed document, which is contrary to every principle of law, and in violation of the Will Act, by which attestation by two witnesses is indispensable to the validity of a will or codicil. The following authorities are cited:—*Rose v. Cunynghame*.† *Edwin v. Gallini*.‡ *Noble v. Whytall*.§ *Kay v. Robins*.¶ *Buck v. Norton*.** *Lane v. Stanwell*.†† *Holloway v. Holloman*.‡‡ *Slater v. Jesson*.§§ *Wright v. Dodson*.¶¶

Dodson, Q. A., for the Countess de Zichy Ferri, objected to these papers, that no prospective papers duly attested can give effect to a paper not attested; that, as to a retrospective, it must be express and direct, and that the term means only an instrument executed according to

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Co. Ferraris v. Marq. Hartford.

L. R. 373.

n. 156.

K. 769.

P. 57.

29.

06.

† 12 Ves. jun. 29.

§ 3 Meriv. 691.

¶ 1 Ad. & E. 423.

†† 6 T. R. 352.

§§ 5 Ves. 401.

¶¶ 2 Bligh, O. C. 56.

MARCH 17. the recent Statute. Now in the will, the testator directed executors to pay all legacies which he shall or may be by any codicil or testamentary writing, "whether will or not." So that it is clear that he never intended to fine the term "codicil" to attested papers, or codicilically so called. He has directed that all the codicil testamentary papers should form part of, and be incorporated with, his will. Although the Court of Probate now guided by the intentions of a testator, but by the Statute, still it will look at these intentions and put them into effect if it can, and it is clear what the intention of the Marquess was. As to the prospective reference to the will, the codicil of October, 1838, does not refer to that, for there is a later instrument duly attested which refers to it, though not directly and expressly. Thus it is shewn that the codicils to be made after the will, whether attested or not, shall be valid, and in the codicil of 1841 it ratifies and confirms them, and there can be no doubt of the intention that they should be incorporated with his will. I do not find in the cases that it is indispensable that the reference to the papers should be express and direct. The Court must, undoubtedly, be satisfied that the papers are identified. *Habergham v. Vincent*. *Brudenell v. Bonville*. *Buckeridge v. Ingram*.† *Gordon v. Reay*.‡ *Molineux v. Molineux*.§ I put the case on the analogy between the Statute of Frauds and the Statute of Victoria, for I cannot perceive any difference between them in this respect. It is clear from all the cases, that, where an instrument is referred to so as to leave no doubt in the mind of the Court that it was the instrument intended by the testator, it is sufficient to entitle it to probate, and I submit that, in this case, it is a retrospective, as well as a prospective, reference for confirmation, with sufficient certainty to enable the Court to give effect to the intentions of the testator.

Haggard, D., on the same side, cited, in *at* *Inchiquin v. French*.|| *Dillon v. Harris*. *Guest v. Wilson*.

* 2 Atk. 268.

† 5 Sim. 274.

|| Ambler. 32.

† 2 Ves. 665.

§ Cro. Jac. 144.

¶ 2 Bingh. 429. 3 Id.

nes v. Crowe.^{*} *Utterton v. Robins*. *Crosbie v. McDoual*. MARCH 17.
Smith.† *Re Countess of Durham*.‡ *Doe d. Williams v.* Co. *Ferraris v.*
ms. § *Marq. Hertford*.
Harding, D., for Mr. Croker.—If the three cases of *Smart* Dec. 9.
Prujean, *Wilkinson v. Adam*, and *Habergham v. Vincent*,
still authorities, I may rely upon them, as sufficient to call
on the Court to decree probate of these papers as part of
will. [Examined these cases, and the cases of *Dillon v.*
rris, *Utterton v. Robins*, *Shortrede v. Cheek*, and *Boydell*
Drummond.] With regard to the use of the word “co-
cil,” it is argued that it is a principle of the law, that,
ere a technical word is used, it must be taken in a tech-
nical sense, and the testator having used the technical word
odcil,” the Court must apply to that word its strict tech-
nical interpretation, and consider it to mean an attested
trument. There are several answers to this argument ;
: first and best is, that Courts have always acted upon
: principle that, where the testator has shewn a clear in-
tention, to be gathered from the context of an instrument,
t to use a technical word in a technical sense, but in the
linary sense, it is a rule of construction to take it in this
use. In the present case, it is too clear to be doubted
it the testator never intended to confine the word
odcil” to its strict legal and technical sense, but meant
use it in its largest meaning. So in analogous cases in
e Criminal Courts : a person has been indicted for forg-
g a promissory note, which requires a stamp to give it
lidity ; but one was unstamped, and it was argued that
e term “promissory note” was technical, and that the
te was not a promissory note without a stamp : but the
jection was overruled and the man was executed. Roscoe,
rim. Law. || *Hawkeswood's case*. ¶ *Morton's case*.** So
to the technical words “heirs” and “heirs at law.” *Lane*
Stanhope ; *Thellusson v. Woodford* ; *Holloway v. Hollo-*
vay ; *Jesson v. Wright* ; *Mounsey v. Blamire*.†† Other

^{*} 1 Ves. 486.

† 2 Curt. 796 (1 Notes of Ca. 1).

‡ 1 Notes of Ca. 265.

§ 1 Crompt. & M. 42.

|| P. 392.

¶ 1 Leach, 257.

** 2 East, P. C. 955.

†† 4 Russ. 386.

MARCH 17. arguments may be collected from Mr. Wigram's *b*
Co. Ferraris v. Assuming that the Will Act would apply to these *d*
Marq. Hertford. ments at all, by the words of the 34th section they
exempted as codicils to a will made before the Act. *7*
34th section enacts that "this Act shall not extend to a
will made before the 1st January, 1838, and that every w
re-executed, or re-published, or revived by any codicil, shal
for the purpose of this Act, be deemed to have been ma
at the time at which the same shall be re-executed, re-pul
lished, or revived." If the construction contended for pr
vails, every will made before the passing of the Act
brought under its whole operation by a codicil executed su
sequently, for any purpose, and the Court must look at t
will as made at the date of the codicil. Then, under t
7th section, no will of a person under twenty-one is vali
so that a codicil to the will of an infant, which was go
before the Statute, renders it invalid. Under the 18th se
tion, a will would be revoked by marriage, whereas, befo
the Act, marriage and the birth of a child were necessa
to revoke a will: so that, if a man made a codicil to h
will, he might, without intending, revoke it by so doin
So, under the 27th section, a general devise will give und
certain circumstances a fee, and a construction may thus
given to a will totally different from that which the testat
meant. These are some of the consequences of a will bein
deemed to have been made at the time of its re-publicatio
by a codicil. With regard to the law to be applied to th
codicil, I do not find any case exactly of the same kin
Here is a property not within the jurisdiction, and the pe
son was not within the jurisdiction at the time the act wa
done, and the present Statute is not the law of our colonie
or of Scotland. If the Statute does not apply to Scotchme
and does not extend to the colonies, is it to bind Eng
lishmen in all other parts of the world? *Re Moresby.*
Story, Conf. of Laws.† *Burge, Col. Law.*§ *Curling*
Thornton.|| [PER CURIAM.—You ask for probate of th

* *On Adm. of Extr. Ev.*, Propp. ii., p. 17; iii., p. 42, &c.

† 1 Hagg. E. R. 378.

‡ Pp. 78, 635, 678, 684.

§ 4 Vol., pt. 2, c. 12, p. 586.

|| 2 Add. 17.

in this Court—under what law?] I presume, the law of England. [PER CURIAM.—Then I must be guided by the law of England in the construction of the paper, not by Austrian law.] Be it so, and suppose the Court should be of opinion that the Statute does apply, then I contend, by analogy and by the authority of cases under the Statute of Frauds, this codicil may be considered as sufficiently executed; if the Court is against me on this point, I contend that the Court should give effect to the will as a document, in existence, identified and adopted as a valid instrument. [Further authorities cited:—*Piggott v. Heygate*.^{*} *Meggison v. Moore*.[†] *Goodright v. Meredith*.[‡] *Re v. Heygate*.[§]] It is a principle that a codicil is so inseparable a part of the will, that the republication of the will re-publishes all the codicils to that will, so that the will and codicils come to be considered as one instrument made at the date of the codicil. *Gordon v. Reay*.^{||} *Barnes v. Crowe*. *Jackson v. Hurst*.[¶] *Williams v. Goodtitle*.^{**} Another proposition is, that an unattested codicil clearly referred to by an attested will on the same paper makes the unattested codicil valid to pass land. *Carleton d. Griffin v. Griffin*.^{††} *Doe d. Evans*. In both these cases, the codicil and will were on the same sheet of paper; but that the decision did not rest upon that part is shewn by Mr. Jarman.^{‡‡} The last case is, that the codicil is sufficiently valid by being incorporated in the will, which is shewn by the intention of the testator and the fact. The Court can have no doubt that it was his intention that this codicil should have operation, and in his will he refers to unattested codicils which might hereafter make. It is said that these are not codicils; but the testator begins that of August, 1839, "This codicil to the last will and testament of Francis Charles Hertford." Even if the Will Act does apply to this

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Co. Ferraris v. Marq. Hertford.^{*} 7 Ves. 98.[†] 2 Ves. 630.[‡] 2 M. & S. 5.[§] 1 Meriv. 285.^{||} 4 Ves. 610.[¶] 2 Eden, 271.^{**} 10 B. & C. 895.^{††} 1 Burr. 549.^{‡‡} *On Wills*, 1 vol. 81.

MARCH 17. codicil, it is valid either because the execution of a subsequent attested instrument operates as a re-execution of this or because the testator had sufficiently incorporated this codicil in his will, and afterwards confirmed his will and codicils.

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R. Phillimore, D., on the same side, contended for the validity of the codicil on three grounds:—1st, the clause in the original will. *Hooper v. Goodwin. Brudenell v. Boughton. Swift v. Nash.* Jarman, On Wills.† Rose v. Cunyng-hame.* 2nd, because the codicil is confirmed by that of April, 1839. *Carleton d. Griffin v. Griffin. De Bathe v. Lord Fingal.‡ Guest v. Willasey. Doe d. Williams v. Evans. Bond v. Seawell.§ Crosbie v. McDowal. William v. Goodtitle. Utterton v. Robins. Lea v. Libb.|| Bowes v. Bowes.¶ Ashley v. Waugh.** Johnson v. Johnson.†† Gordon v. Reay. Rowley v. Eyton.‡‡ Jarman, On Wills.‡‡* 3rd, because it is incorporated in and identified by a attested codicil. *Story, Comment.|||| Shortrede v. Ched.* It is objected that when the testator used the word “codicil,” he used it in a technical sense, in conformity with the Statute of Victoria; but the question is, whether he did intend to adopt the phraseology of the Act: it is forcing his language to say he did use the word in that sense. I will read one passage from the Digest on the Construction of Legacies:—“*Sed de his quidem, de quibus dubitari potest, suppellectilis potius, an argenti, an vestis sint, Servius fatens sententiam ejus, qui legaverit, adspici oportere, in quam rationem ea solitus sit referre; verum si ea, de quibus non ambigeretur, quin in alieno genere essent, ut puta escarium, argentum, aut pænulas et togas, suppellectili quis adscribere solitus sit, non idcirco existimari oportere, suppellectile legata ea quoque contineri; non enim ex opinionibus singulorum, sed ex communi usu nomina exaudiri debere.*”¶¶ I think the *communi*

* 2 Keen, 20.

† 16 Ves. jun. 167.

‡ Carth. 35.

** 4 Jur. 576.

‡‡ 2 Mer. 128.

|||| 2 Vol. 303.

¶¶ L. 7, § 2. *D. de suppellectile legata* (xxxiii. 10).

† 1 Vol. 86, 105.

§ 3 Burr. 1775.

¶ 2 Bos. & P. 500.

†† 1 Crompt. & M. 135.

§§ 1 Vol. 176—178.

was the sense in which Lord Hertford used the word. MARCH 17.
*Erris v. Blake.**

Jenner, on the cases.—It has been contended by the Counsel for the Countess de Zichy, that the prospective clause in the will, under the Statute of Frauds, gave effect to the untested codicil, notwithstanding the new Act. (He was proceeding to refer to cases he had already cited, when)

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Harding objected to this course, as it was commencing a new argument. Dr. Jenner had no right to reply (on the question as to the admission of an Allegation), except on the cases cited by the Counsel for the Countess and Mr. Croker for the first time. He had no right to argue on cases cited by himself.

PER CURIAM.—The usual course is to reply to cases cited by the other side; but if the cases go to establish a different proposition, I apprehend you are entitled to refer to the cases cited by yourself. Perhaps we act upon a different principle from other Courts. I wish you to adhere to the cases cited by the other side, and those from which you intend a different view should be taken.

(*Jenner* and *Elphinstone* then proceeded to reply on the cases.)

SIR H. JENNER FUST.—It may not be immaterial, in the first place, to see how the law stood before the passing of the Statute, 1 Vict. c. 26, and to consider the alterations which were introduced into our testamentary law by that Statute, with respect to wills of personal and of real estate, so far as these alterations apply to the present case, and I do this because a great many questions turned upon the construction put upon the Statute of Frauds† by the different Courts of Law and Equity.

JUDGMENT.

By sect. 5 of the Statute of Frauds, a will of real estate was required to be signed by the party devising, or by some other person in his presence and by his express direction, and attested and subscribed, in the presence of the devisor, by three or four credible witnesses. With regard to wills of personal property, they were not required to be attested;

Alterations made by the Will Act.

* 1 W. Black. 672. S. C. 4 Burr. 2579.

† 29 Car. 2, c. 3.

MARCH 17. *Co. Ferraris v. Marq. Hertford.* it was sufficient that the will was reduced to writing in the life-time of the testator, and that it contained his real wishes and intentions. Under the old law, therefore, these papers would have been entitled to probate. But the 9th sect. of the present Statute enacts that no will shall be valid unless signed at the foot or end by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, who shall subscribe the will in the presence of the testator. This, therefore, is what is now required for the execution and attestation of wills, and under the term "wills" the Court has held that codicils are included. It is difficult to suggest any words more plain, simple, and comprehensive than the words of this section of the Act, and it seems absolutely impossible, in the ordinary sense attached to the expressions, to raise any question with respect to their true import and construction.

Under the Statute of Frauds, with respect to wills of real property, many questions of great intricacy and difficulty arose, and amongst others, this very important question, namely, whether an unattested codicil, clearly identified by a subsequent will duly attested, was valid. Although many of these nice and difficult questions have been set at rest by the 9th section of the late Statute, every day's experience shews that a sufficient number remains undetermined to afford scope to much ingenious speculation and inquiry as to the real intent and meaning of the very plain and simple directions of this section. A question of this kind arises in the present case.

The first codicil. The first of the papers in question is signed at Milan, not within the dominions of her Majesty, and it purports to dispose of property situated in the United States of America; and it is said that, by his will, the deceased reserved to himself the power of disposing of property by way of codicil or testamentary writing under his hand, though not attested, and that the unattested papers were confirmed and ratified by a codicil of subsequent date, duly executed, which supplied the defect of execution.

Now, with respect to the first paper, it is material to inquire the rules which apply to papers executed in places not within her Majesty's dominions; whether the circumstance of the deceased having been resident at Milan when he executed the paper of October, 1838, exempted him from the necessity of conforming to the law of this country. It is not pleaded that the late Marquess was domiciled at Milan, but merely that he was resident there temporarily, as a visitor, having his domicile in this country. The law of Austria, it is pleaded, would give effect to this codicil, as the act of a foreigner resident in that country; but it does not, therefore, follow that this Court could decree probate of the paper unless the domicile of the party was there. It is too late now to contend that the succession to personal property, in cases of testacy or of intestacy, is to be governed by any other law than that of the country in which the deceased had his domicile. The case of *Stanley v. Bernes* disposes of the whole question as to cases of testacy, deciding that a will, to be valid, must be executed according to the law of the country where the party was domiciled. Following that decision, by the Court of Delegates, I am of opinion that the circumstance of the paper having been written and executed at Milan does not exempt it from the law of the country in which the testator had his domicile.

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the law of the
domicil;

Now this goes in some degree to dispose of the next question, arising from the locality of the property—whether property situated in the United States of America can be disposed of by a will executed in any other manner than the law of the domicile requires; and I am of opinion that it is clearly established by all the cases, that the law of the domicile governs, and not the *lex loci rei sitæ*. In *Stanley v. Bernes*, this question was likewise examined, and it was determined, upon the principle *mobilia sequuntur personam*, that the disposition is governed by the law of the country where the party was domiciled. The *lex loci* may govern questions as to the grant of administration, but not of distribution of property. In cases of wills of Scotchmen, where the property is in this country, the rule is to come to this Court for administration, but this Court always follows the law of

not the *lex loci
rei sitæ*.

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 ———
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the domicil, acquainting itself with the fact, whether the testamentary disposition is valid according to the law of the domicil. If the Courts of America do not adopt the rules which are acted upon in this Court, it is competent to the Courts of that country to grant administration ; but this Court, when probate is asked in this country, must govern itself by the law of this country, and cannot grant probate of a paper not executed according to the law of this country.

Prospective
 clause in the
 will.

The third question is as to the clause in the will of the testator, upon the construction and effect of which the Court is now to give its opinion. The purport of the clause is to revoke all former wills, but to ratify and confirm all codicils which the testator may have executed, and he directs that future codicils executed by him should be incorporated with and form part of his will. Now the effect of the clause itself shews, without reference to any extrinsic circumstances, its meaning to be this : an intimation and direction to his executors that he intended to make certain exceptions from the clause of revocation, which is revocatory of all former wills, but not all former codicils, and to except certain memoranda, for he refers to papers and instruments in existence, which are not codicils, and also an intimation to his executors, that if he should leave behind him any papers of a testamentary kind, dated after the date of the will, which should be merely signed by him, and not attested by witnesses, they were nevertheless to be considered as good and valid codicils ; an intimation and direction that he meant to reserve to himself a power of disposition in some other form, but which was still valid by the law of this country ; for, as the law then stood, it was not necessary that he should have reserved to himself such power, as the law would have given effect to any instrument written or signed by him, though not formally executed or attested, so far as his personal property was concerned. This clause of the will, therefore, I consider as an intimation and direction to his executors, that any codicils left by him, not attested by witnesses, were meant and intended to be a good disposition of his personal property. Having executed his will in the

sence of witnesses, he might think it necessary, with respect to those papers which are not executed, like his will, the presence of three witnesses, to intimate to his executor, that any codicils in his handwriting, and signed by him, though unattested, should, nevertheless, form part of his testamentary disposition. But as the law, before the date of these codicils, had been altered, and it was no longer competent to a British subject to dispose of his property in any other manner than by a will or codicil, executed according to the provisions of the 9th section of the Will Act, the question is, had he, or could he reserve to himself, such power—a power of disposing of his property in any other manner than as, by the law of this country, a domiciled subject could be authorized so to do?

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A great deal of ingenuity and learning was displayed in the Argument, as to the law which applies to these cases, and a vast number of authorities was cited, which were proposed to affirm the power the deceased would seem to have reserved to himself, and the general result of these cases appears to be this: that, notwithstanding the Statute

Result of authorities.

Frauds has said that all devises of lands shall be invalid unless they are executed in the presence of witnesses, yet, nevertheless, it has been held by Courts of Common Law and Equity, that a codicil or paper unattested may be sufficient, under certain circumstances; that is, that a paper duly executed may so clearly and indisputably refer to an executed paper, that such a paper, whether of a testamentary form and character or not, so clearly and indisputably referred to, may be considered as identified with, and to form part of, the will duly executed, just in the same manner as if it had been repeated *totidem verbis* in the will itself. That, I think, is the general result of the cases; and the legal point is this: that, with regard to the incorporation of papers, a paper imperfect in itself may be so identified in an instrument validly executed, that it may be considered as part of it, and consequently, that the defect of authentication by the attestation of witnesses subscribed to the paper is cured.

Now a case decided upon this principle is that of *Har-*

MARCH 17. *bergham v. Vincent*, and it may be necessary to consider what that case, and the principles upon which it was determined, were, and what fell from the Lord Chancellor the learned Judges by whom he was assisted on that occasion. That case was carefully considered, and a great number of cases which preceded it are cited in the report.

Habergham v. Vincent. That case occurred in 1793, and it appears that the testator, Samuel Hill, made his will on the 5th October, whereby he devised all the copyhold estates which he surrendered to the use of his will, and also all his freehold estates, to five persons named in the will, upon trust, remainder to such person or persons, for such estate, subject to such charges, provisos and conditions, as he should by any deed or instrument in writing, to be executed by him, and attested by two or more credible witnesses, direct, limit, or appoint, and for no other purpose." This will was duly executed and attested, and by an instrument, dated the following day, under the hand and seal of the testator, attested by two witnesses, stamped and concluding like a deed, he reserved his will, and that he had reserved a power of disposing of his real estate further, and directed his trustees to convey the real estate as therein mentioned, and as the deed was attested by only two witnesses, the question was, whether it could pass freehold property. The case came on before Lord Thurlow, who, after taking some time to consider, directed a case for the opinion of the Court of King's Bench, whether the two instruments (the one a regularly executed will, the other drawn up as a deed), taken together, were sufficient to pass any estate or interest in the freehold copyhold premises, or either of them, not given by the first instrument; and whether, upon the death of the testator, any and what estate or interest in the freehold copyhold premises, or either of them, passed by the first instrument to the surviving trustee, or would at his death pass to the person who should be his right heir. It appears that, when the case was sent for the opinion of the Court of King's Bench, in consequence of too short a statement of the case, the Court of King's Bench understood

and instrument as merely a deed, and reported that the instruments could not be united, and that the two instruments taken together were not sufficient to dispose of sold or copyhold estate. The trustee afterwards proved second instrument in the Ecclesiastical Court as testamentary and the cause was set down for further directions, and, a good deal of argument, the Lord Chancellor (Eldon) expressed his opinion, that it was right that the case should be argued before him, with the assistance of two Judges of Common Law; and accordingly the case was argued before him, with the assistance of Mr. Justice Buller and Justice Wilson, and, after considerable discussion, the judges delivered their opinions. The opinion of Mr. Justice Wilson is to this effect:—

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Upon the first question, if the deed had not been made, or being as a deed, it can have no operation, there is a resulting trust for the heir, who is entitled to the whole remaining beneficial estate, and the trustee takes nothing. It was then contended by the heir of the surviving trustee, that this instrument, though the testator called it a deed-poll, though it is stamped, though it contains no nomination of executors or terms of gift, but of limitation and appointment, and though it concludes like a deed, sealed and delivered, being first duly stamped," yet may be, if it may be, ought to be, considered as testamentary, so that it may be connected with the will, and both may make one testamentary disposition of the estate; and upon the first consideration, my opinion is, that, if this instrument, connected with the former, have a legal operation to pass any part, I think it may be so considered as testamentary; because, when the testator made his will he disposed of his estate to a certain extent, and then professed his intention to make a further disposition. It is true, he at the same time conceives, and erroneously conceives, he could reserve a power by his will to limit and appoint uses out of his estate by deed or instrument attested by two witnesses only; but he does not profess that he will do it by deed only; therefore, it seems that, at the time he made his will, and when he wrote the instrument, his principal intention was, to complete that he left incomplete by his will—viz. the disposition of his real estate. He had made his will in part, and then professed an intention to do more to complete that will; but he could not do it by declaration of uses out of his own estate, when no part was de-

MARCH 17. parted with by him. The law will not permit that; but it may be done by will; and the general rule is, that when a man has expressed a clear intention to dispose of his estate, and has taken an ineffectual mode of doing it, yet, if the instrument can be construed in another manner so as to effectuate his intention, the ceremony is matter of form, and the substance shall be carried into execution, if it may by law. Though the testator has called this a deed, yet, as the intention was to complete what was incomplete by the will, as it is in writing and signed, and as to some purposes, perhaps to all, it may have a legal operation, if testamentary, in order to sustain the intention, it is fair so to consider it; and I do not know any rule that stands in the way. It is contended that, under the circumstances, and considering the two instruments as one instrument, the freehold estate will pass by these two taken together, though the latter is not properly executed to pass freehold. As to that, the first way in which it was considered was, that where there is a prospective sort of limitation, as in this case, a prospective reference to something to be done, the party foregoes the benefit of the Statute; and therefore, the subsequent instrument he has mentioned shall have the same effect, though not properly attested, as if attested by three witnesses. If the Statute of Frauds could be considered as that sort of law to which this maxim would apply, "*quisquis renunciat potest juri pro se introducto*," that would apply in this case: but the Statute was not made for the benefit of the testator only, but for general public purposes. By the common law, a man could not devise land. Then came the Statute permitting him to do so by an instrument properly signed. Then, lest testators should be imposed upon, these guards were introduced by the Statute of Frauds, and that insists that a will of land shall either be executed in the manner pointed out, or be void. This does not leave it at the option of the testator, but is a positive provision that a will shall be void if not executed according to that Statute.

So, the words of the 9th section of the Act of the 1st of her present Majesty declares that no will or codicil shall be valid unless it shall be executed in the presence of witnesses, and in the manner pointed out by that section; and that provision was made, not for the benefit of individuals, but for the greater protection and security of the public, and it was not competent to the Marquess of Hertford to reserve to himself a power of disposing of his property by a will or codicil executed in any other manner than is re-

quired by this Act. The power of a testator under the present Act cannot be considered greater than that of a devisor under the Statute of Frauds; the argument applies in the same manner to him, and the same consequence follows. As Mr. Justice Wilson says:—

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The testator cannot say, he will make a will without the requisites prescribed, either not thinking he will be imposed on, or not caring about it. The law will not suffer that, but requires, in all cases, that these ceremonies, which might be considered as circumstance only, if the Act had not said otherwise, shall be essential, and be observed in making every will. Therefore, this cannot be supported as a testamentary paper on that principle. I believe it is true, and I have found no case to the contrary, that, if a testator in his will refers expressly to any paper already written, and has so described it that there can be no doubt of the identity, and the will is executed in the presence of three witnesses, that paper makes part of the will, whether executed or not, and such reference is the same as if he had incorporated it.

And, therefore, if the Marquess of Hertford had so described any previous papers, and stated that they were intended to form part of his will, the Court would have held them to be as much a part of his will as if incorporated in the will itself, and would have given effect to all these three codicils, if so identified, as a good disposition of his property, as well as to the other papers. But the object here is to give effect to papers not in existence at the time: the papers are *in futuro*—the codicils were to be written.

Now the result of Mr. Justice Wilson's opinion was, that the paper, not forming a part of the will of the testator, and not being incorporated, or not being in existence at the time when the deceased wrote the will (it bore date the day after), and not being executed in conformity to the Statute of Frauds, had no operation upon the freehold estate, and therefore it was immaterial whether it was considered as a deed or as a will; because as a deed it was void, the limitation being too remote; and as a will it was void, not being properly executed. The next consideration was, what effect the paper could have upon the copyhold estate, and as the copyhold had been surrendered to the use of the will—and

MARCH 17. in such a case a man may, by any testamentary paper not executed in the presence of three witnesses, direct the uses
Co. Ferraris v. Marq. Hertford.—this paper being considered testamentary was sufficient to dispose of the copyhold estates.

The purpose for which the Court has adverted so minutely to this case of *Habergham v. Vincent* is, to shew that a paper, though informally executed, may be considered a good disposition of real property, provided it be so clearly and distinctly referred to that there can be no mistake as to its identity in a will regularly executed subsequently; otherwise, it cannot be considered as incorporated with and part of the will.

Mr. Justice Buller was of the same opinion as to the effect of the deed, as affected the freehold property. He concurred in opinion with Mr. Justice Wilson, that the deed, not being executed according to the Statute, not being in existence at the time the will was executed, and therefore not being expressly referred to, could not form part of the will.

The Lord Chancellor then gives his opinion upon the subject, and it may not be improper to consider part of his judgment. He was of opinion that, taking the second instrument as a deed, the opinion of the Court of King's Bench on the case submitted to them was well founded.

Concurring entirely with my lords the judges, nothing remains but to state shortly the precise points upon which my opinion takes the same direction. I am of opinion that upon the will there is clearly a resulting trust for the heir, as far as there is no disposition of the beneficial interest. Secondly, that the last instrument, though called a deed, though in the form of a deed, is testamentary: it is dependent upon the will, and will have all the effects that a testamentary act so executed can by law have. Thirdly, that there is no difference between law and equity, in determining upon the effect of a testamentary act, and this instrument cannot pass the freehold contrary to the provisions of a public law making that act void. The distinction has been very fully stated between a will duly executed, which is a competent disposition by reference to a prior instrument, and a will, which is an imperfect disposition, by reserving a part, the reserved part to be afterwards disposed of by a future instrument. It was agreed that the determinations in this Court had established a more favourable construction as to infor-

l codicils, and that argument referred to cases in which the
art held that legacies, given by an informal instrument, would
uch upon real estate charged by a will properly executed. The
ervation made by Mr. Justice Wilson is unanswerable, that it
ot a personal privilege; that no man can reserve a power to
against the forms the law has imposed. Therefore, if it is to
s by a testamentary act, that must have all the requisite so-
nities the law has directed.

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Therefore, he agreed entirely with him as to the law,
t, in order to give effect to a testamentary paper in-
nally executed as part of a regularly executed instru-
nt, there must be a clear and distinct reference to the
er as being then in existence. He agrees that a testator
not reserve to himself a power to act against the law,
l he refers in his judgment to cases (many of which
re cited in the present Argument)—*Brudnell v. Boughton*,
and Inchiquin v. O'Brien, with several others—in affirma-
n of the doctrine; and it follows, therefore, from this
nstruction of the law, that if a testator expressly refers to
paper already written, and there can be no doubt or diffi-
alty as to its identity, and the will which refers to it is
ily executed, the paper referred to forms a part of the
ill, whether executed or not, and I am ready to subscribe
the doctrine so laid down. But it must be an existing
per; according to the decision, a testator cannot reserve
himself a power of disposing of real estate by a paper
t in existence at the time; and he cannot reserve to him-
lf the power of disposing of his property contrary to law.
e effect of the decision in *Habergham v. Vincent*, and
many other cases cited in the report, confirms this doc-
ne, which also shews the limitation with which the rule
s adopted,—that the paper must be an existing paper at
s time the will was made.

There is a number of other cases and authorities as to the
itation of the rule, and in that of *Smart v. Prujean*,
erence was made to the case of *Habergham v. Vincent*,
deciding that, under a charge of legacies upon land, le-
cies given by a subsequent unattested codicil would be
arged, and there is no doubt of this. In the case of

Smart v.
Prujean.

MARCH 17. *Smart v. Prujean*, the testator executed a will, duly attested, whereby he devised his real estates upon trust for such purposes as he should by a private letter or paper of instructions, which he intended to leave with Mrs. Johnson, the superior of an English Convent at Gravelines, direct or appoint. After his death, in his bureau in the room in which he had resided, belonging to and adjoining the monastery of English nuns at Gravelines, of which Clementine Johnson was superior, two paper writings were found in the same envelope with the will, which envelope was sealed up and endorsed, in the hand of the testator, "the will of Anthony Lowe." The Lord Chancellor said :—

I am very strongly of opinion, thinking these two legacies would be good if the fund was well given, that there is not sufficient legal certainty to be collected from the instrument signed by three witnesses, that the testator has disposed of his real estate. The rule goes no further than this (I except charges for debts and legacies): that if the produce of real estate is to be disposed of, you must shew an instrument in effect executed by the testator in the presence of three witnesses, and evidencing from its own contents that it is so in a sense, even if no attestation is annexed to it. The rule of law is, that an instrument properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is which is meant to be incorporated, in such a way that the Court can be under no mistake. Judging as a private individual, there can be no doubt that, when he executed the will, he meant that instrument and these two letters should have their effect; but unless the rule of law allows me, I cannot establish the letters. In favour of an heir-at-law, whom I must see disinherited by nothing but a clear manifestation of intention, it would not be too strong to say, the testator did not mean his will to be consummate unless he should do that act, of leaving it with the superior, which he never did. But there is another ground: not whether the same envelope or superscription is evidence that the testator meant these should be the papers referred to; but whether I must of necessity collect from the contents of the will, that they should be considered the same. The same cover is nothing with reference to the Statute, and the superscription has not three witnesses. The true question is, if these papers were found in the bureau with the will, can I say from the contents of the will these two papers are the papers

red to? Suppose several other papers were found with them, MARCH 17.
 and I say this will would have enabled me to select these two
 the only papers referred to? The rule and my opinion are, *Co. Ferraris v*
Marq. Hertford.
 the will has not by its contents sufficiently identified these
 ers to enable me to say they are necessarily incorporated:
 not, they are not attested by three witnesses, and it is ad-
 led on all hands that this sort of disposition, unless the ante-
 ent paper is incorporated, cannot be brought within the rule as
 lehts and legacies charged on real estate by an unattested
 er. I cannot, therefore, give these parties their legacies,
 igh I regret it.

nd, to be sure, a stronger case in its circumstances
 ld not well be, leading almost to a presumption that
 e papers, found sealed up in an envelope with the will,
 ld be considered as part of the will. The Lord Chan-
 or regretted that he could not give the parties their lega-
 , and, as a private individual, he had no doubt that the
 ator, when he executed his will, meant that these two
 ers should have effect; but they were not necessarily in-
 orated with the will, and though he evidently intended
 they should form part of his will, they were not incor-
 ted or made part of his will, and, being unattested, they
 equently had no effect as a disposition of real property.

have cited more of these cases than might be otherwise
 isite, in order to save the necessity of adverting to other
 lar cases, and I think they clearly shew that, as Lord
 on says, to bring an unattested paper within the rule as
 egacies charged on real estate by such papers, it must
 clearly identified and incorporated in the will.

ow, with respect to the extent to which real property Charge of real
estate with le-
gacies by an
unattested pa-
per.
 be charged with legacies by an unattested paper, no-
 g can be more clear, to shew the principle, than what
 id down by Sir William Grant, the Master of the Rolls,

Rose v. Cunynghame. In that case, it was argued that
 real estate was charged with all the legacies which the
 ator should bequeath by an instrument to be executed by
 . The Master of the Rolls said:—"The charge is of a
 peculiar nature; not of all legacies he shall afterwards
 , but of all such legacies as he shall afterwards charge

MARCH 17. upon the estate, or make payable out of it." Now, real estate and the personal estate had been charged the legacies, the general legacies, to be given by him, a primary fund and the other to assist, then the charge the real estate would have been a good charge; but was only to remain liable to the charge of such legacy he should afterwards charge on the estate, or make payable out of it, the Master of the Rolls was of opinion that could not be a charge upon the land. He said:—

Rose v. Cuyngthame.

Suppose he had given a general legacy by his will, that would not be charged upon this estate, nor a general legacy by a codicil. For that purpose, the legatee must shew that the legacy was chargeable upon, or payable out of, the Grenada estate. It seems in effect a reservation, by a will duly executed, of a power to charge the Grenada estate by a will not duly attested. When a man by a will, duly executed, charges all legacies generally, pressing his resolution that, whenever he gives them, they shall be a charge, it is determined that, whenever given, they shall be a charge. But, according to this, it is not in the duly attested will alone that you find the charge, but the intention to make a charge may be in the unattested instrument, the codicil. That is only an attempt to reserve by a will duly executed a power to charge by a will not duly executed. It is the case of *Haley v. Vincent*. It might as well have been contended, in the present instance, that there was an adoption into the will of that instrument; but the opinion of the Lord Chancellor and the majority was, that it was not competent to a man to give himself such a power—viz. a power to dispose of land by an unattested instrument. That is the reservation this testator attempts to make unless he thinks fit, when he makes his codicil, to declare his intention that his land shall be charged with the legacy. If not, it shall not be charged.

So that the distinction between these cases is this: where landed property is charged by a will duly executed for the general payment of debts and legacies, there and the moment it is shewn that there is a debt or legacy, in whatever instrument the legacy may be given, the charge attaches upon the land. But why? Not by virtue of the unattested instrument, but by virtue of the duly attested instrument, by which the land had been charged. Th

principle on which the cases have all along proceeded, that you may incorporate an unexecuted paper into a will, and that the will is duly executed, by a sufficiently clear and distinct charge upon the land, and not by a charge upon the produce of it, with respect to which there can be no doubt that when you have once charged legacies on a will duly executed—that being a general charge upon the will itself—you render the land subject to the payment of legacies, given by whatever form of instrument may be given.

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The same doctrine is adopted, and the same argument employed, as to the reservation of a power, in the case of *Hooper v. Goodwin*, where the Master of the Rolls has drawn the line between a charge upon the land, as an auxiliary fund, and a charge upon the produce of the land, when the land is sold.

Hooper v. Goodwin.

He says: "The principle of these cases is disputable"—that is, where legacies are in a will, and the testator is liable to the same considerations as debts: it was thought that a man might owe at his death, but, having contracted debts with his estates, it was thought that, that being so fluctuating in itself, it was necessary to reserve a power, notwithstanding the Statute of 1752, considering that it was uncertain what legacies he might give at the time of his death, they were considered upon the same principle as debts contracted after the death of the testator, and to be charged on the land, that charge having been created by a duly executed instrument. "The principle," he says, "may be disputable; but by whom they were decided did expressly decide with regard to a charge upon land only, and by the produce of it, a devise cannot be made out by a will executed according to the Statute."

These cases go upon the same principle, that, in respect to a charge upon land by an unexecuted instrument, a charge must be made by a legally executed will; consequently, as the same principle is to be applied to a will of personalty as formerly to a will of real property, a charge must be made by a paper executed according to the Statute, and no prospective power is given to a testator

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 ——— codicil than one executed according to the provision
Co. Ferraris v. Statute now in force.
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Such being the effect of the cases, and the law :
 present stands, the next question is as to the confirm
 two of these papers by the codicil of November,
 Now, the question upon this part of the case depend
 much upon the effect to be attributed to the codicil
 April, 1839, which is as follows:—

Codicil of
 April, 1839.

This is a further codicil to the will, testament, and codicil
 Marquess of Hertford, K.G. I had in former codicils
 voured to give as much as possible to Lady Strachan; now
 to withdraw all except a provision of seven hundred a year
 my old family settlements, which I am entitled to bequeath
 one for life, and what I give underneath. I give her the said
 Strachan ten thousand pounds, to Charlotte Countess de
 Ferraris fifteen thousand pounds, and to Matilda Countess de
 toldt five thousand pounds; and I direct that these sums be
 and primary charge upon all the manors, messuages, lands
 and hereditaments in the county of Warwick, and prefer
 the parish of Salford (the town of Birmingham to be excepted)
 and over which I have any disposing power; and I ratify
 confirm my said will and codicils, except as before excepted
 every other respect. In witness whereof, I have hereunto set
 hand and seal, this twenty-sixth day of April, 1839. H.
 Signed and sealed by the said Marquess of Hertford, K.
 testator, as and for a codicil to his last will, in the presence
 who, in his presence and at his request, and in the presence
 each other, have subscribed our hands as witnesses.

The alleged
 confirmation.

The question, therefore, is, whether this ratification
 confirmation of the “said will and codicils” is sufficient
 give effect to these codicils, they not being entitled to pass
 as they stand by themselves, without a confirmation of
 them.

Now, this is undoubtedly a very important point
 regard to questions which are continually arising in
 Court, and with respect to which, at present, there has
 no decision given in Courts of Common Law upon the
 instruction of the Statute.

I may here at once dispose of a part of the argument

possibility of the Allegations, as to the application of the Act to codicils to a will of a date antecedent to the Statute was to come into operation; for it is MARCH 17.
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in one of the sections, that the Act should not apply to wills executed before the 1st January, 1838. It is held that the will, in this case, having been executed before the 1st January, 1838, the codicils must also be held to have the same date themselves as the date of the will, therefore, it was not necessary that they should be attested according to the provisions of the Statute. But the majority of opinion that that is not the true construction of the Statute. The construction which the Court has put upon that section of the Act is this: that wills executed before the date of the passing of the Act and the day on which it came into operation, would not require to be attested in the presence of two witnesses; that they would be valid notwithstanding they should merely be signed by the testator, as far as personal property is concerned; but that, where an alteration was made in these wills after that date, then that alteration must be authenticated in the manner required by the Statute. For instance: an obliteration made after the 1st January, 1838, can only be effectual where it was attested by the subscription of the testator and of two witnesses, in the manner directed by the Act, and alterations made in like manner be attested by two witnesses. This decision has been upheld by the Judicial Committee of the Privy Council, in the case of *Brooke v. Kent*. The Judicial Committee held that the Act did apply to alterations made after 1838 in a will of prior date. If it applies to an alteration made in a will, *a fortiori* it applies to alterations made in that will, or additions made to that will, by codicil or paper subsequently to 1838.

The question is, whether this codicil, which is executed according to the provisions of the Act, can give effect to informal instruments. Now, this part of the case is a measure depends on the principle laid down in *Am v. Vincent*, and other cases cited in *Argument*, *Prujean*, and a case which I forgot to mention, *Harris*, which is much of the same description,

The Will Act applies to codicils made after 1838 to a will made before 1838.

Effect of codicil of 1839 on the informal instruments.

MARCH 17. where papers failed for want of sufficient identification. These are imperfect instruments; and the question is, what are they? They are invalid in themselves; they are invalid as codicils; consequently, they are not codicils, and they can have no effect or operation as such. If they are to have effect and operation, after what the Court has said, with respect to other instruments, it must be by a codicil which ratifies and confirms all former wills and codicils. Then comes a very important question, whether these unexecuted papers are to be considered as codicils or not, and as confirmed and ratified by this instrument, and are to have effect in consequence of it. Here is the great difficulty, and the great point of the case. There is no doubt whatever—and it is not necessary to refer to authorities for that purpose—that all codicils are parts of a will, and that a codicil referring to a will and professing to republish the will, will also be a republication of the codicils attached to that will; and numerous cases have been cited, and strong cases, to shew the manner in which that doctrine has been applied; and I entirely assent to the doctrine, that if a will is republished, the codicils to that will are also republished. It has been held in a variety of cases, with respect to the construction of wills, and their operation upon real property, that an unexecuted codicil may by a properly attested instrument be rendered valid and effectual by republication. The case of *Utterton v. Robins*, which was referred to in Argument, is a strong case to shew that a codicil, referring to an unexecuted paper, or without even referring to it, provided it is written on the same sheet of paper, would give effect to that codicil, though of itself it was not executed so as to pass real estate. But the great question here is, as to the description given of the instruments—whether they are meant and intended to be revived by the deceased and made effectual, and whether, if he so meant and intended to revive them, it was possible he should give them that effect.

Papers on the same sheet. Now, from the cases referred to in Argument, as bearing upon the subject, it is clear that, where papers have been written on the same sheet of paper with the will, the execution of those codicils is held to have been a sufficient repub-

on of them, there being an internal annexation, with March 17.
 it to which there was no doubt whatever. The case of *Co. Ferraris v. Marq. Hertford*.
the v. Lord Fingal was the case of an appointment of
 ian to children by a will having only one witness,
 as by the Statute,* in order to render valid a testa-
 ry appointment of guardians, two witnesses were re-
 l; it was held, however, that, though the will was
 ectly attested, it was rendered perfect by a codicil
 attested, by its being declared to be a codicil to a will
 unto annexed," on the same sheet of paper, the Mas-
 the Rolls holding that it amounted to a re-execution
 republication. Therefore, there was a reference to an
 ment being on the same sheet of paper, to which it
 ed. Again, in another case cited in Argument, *Doe*
Williams v. Evans, the will, purporting to dispose of
 old property, was neither signed nor attested, but re-
 e was made in a codicil to the foregoing will: "I
 a codicil to the foregoing will." It was held that the
 ation extended to all, and Mr. Baron Bayley said that,
 codicil had not referred to the will, he should have
 ht that it did not set up the instrument. But in the
 of *Gordon v. Reay*, the Vice-Chancellor was of opinion
 the second codicil duly attested, which recited a will,
 was also duly attested, by date, which expressly con-
 d all provisions and bequests in favour of a particular
 dual, amounted to a republication of the first codicil
 ested, charging freehold lands. Therefore, there can
 doubt that, if this paper had been written on the
 sheet, and had referred to these codicils, or any of
 that would have been a good republication, and have
 effect to them. It was held by this Court upon mo-
 in *The Goods of Smith*,† where the attested codicil was
 the same sheet of paper with a previous unattested
 l, that it was sufficient to give effect to that codicil.
 ere the great difficulty arises from the description given
 is paper. Is it clearly manifested upon the face of this
 that it was the intention of the testator to give effect

* 2, c. 34.

† 1 Notes of Ca. 1; since rep. 2 Curt. 796.

MARCH 17. to these unexecuted codicils by the general description "codicils?" If it is not, does it not fall within the rule laid down by Lord Eldon, in *Smart v. Prujean*, that he cannot conjecture—that it must be so plain and manifest that there can be no mistake? The Court is not at liberty to indulge in conjecture. He was of opinion in that case that the rule of law did not warrant him, and he decided that there was a failure of proof of identity. So in *Dillon v. Harris*, and other cases referred to in Argument.

The term "codicils" in this case equivocal. Now how stands the case? I may feel strongly that it was the intention of Lord Hertford that the papers should have effect, notwithstanding they were not executed according to law; but I have great doubt and great difficulty in coming to the conclusion that he does by the description of "codicils" legally express that intention, so as to leave no doubt upon the mind of the Court. The difficulty arises upon these points: there are two sets of instruments to which this description may apply. It is contended that it may apply to the unattested instruments, because the testator described them as codicils. It is clear it may apply to another class of papers—namely, those duly executed, because they are codicils to the will; and although it was strongly urged that there was no necessity for the ratification and confirmation of an instrument duly executed according to the law as it stood, therefore the Court must attribute this ratification and confirmation to those codicils which, without it, would have no effect; yet I think the force of that argument is much met by the observation, that there were other codicils—that this codicil confirmed and ratified what he had before done before it became necessary to confirm and ratify them—when these codicils, which were executed according to the law as it then stood, were entitled to have effect. What is done in this class of cases? Lord Eldon, in *Smart v. Prujean*, said:—"Suppose there were other papers, could I select some as the papers referred to? I may conjecture, but the fact must be so manifest that there can be no doubt or difficulty." So here, must I not have it clear upon the face of the papers themselves? The Marquess was not in possession of one of the papers; he

red it to the Countess de Zichy Ferraris. But can I
 pon this general description, which it has been argued
 es all necessity for a more particular description, that
 ator meant to include in the description of "codicils"
 not entitled to that description? They were not co-
 in the eye of the law.

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ood deal has been said in reference to the construction
 given to technical words, and the use which is sup-
 to have been made of them by the testator, and many
 were adverted to, into which it is not necessary for the
 to enter particularly, to shew that the *primâ facie*
 uction to be given to technical words must be, that,
 bly, they were used in a technical sense; but that,
 it appeared from the context that it was not the in-
 n of the testator to use them in that sense, then the
 popular sense might be given to them; and amongst
 cases was cited that of *Wilkinson v. Adam*. That case
 ited for another purpose in the Argument—for the
 se of shewing the necessity of a distinct reference
 paper intended to be incorporated with an attested
 ment. The question in that case was with respect
 description of "children" in the will of the testa-
 and Lord Eldon expresses himself in these words:—
 rule cannot be stated too broadly, that the descrip-
 'child,' 'son,' 'issue,' every word of that species,
 be taken *primâ facie* to mean legitimate child, son, or
 but the true question here is, whether it appears by
 we call sufficient description or necessary implication
 he testator did mean these illegitimate children." The
 on had been before him previously, and he had re-
 ad the assistance of three of the common law judges,
 gave their opinion in writing upon the interpretation
 onstruction of the will, upon the word "children,"
 is used there, and the judges seem to have been of
 n—coinciding with his lordship in the general inter-
 ion—that illegitimate children were intended; yet they
 to intimate an opinion that legitimate and illegitimate
 en might be included under the same description of
 dren;" but Lord Eldon expresses strongly his opinion

Construction
 of technical
 words.

MARCH 17. that it would be very difficult to persuade him that legitimate and illegitimate children could take under the same description of "children," having before laid it down that, where the word "children" was used, legitimate children were *primâ facie* intended. Now that case did not make it necessary for his lordship to determine that question; but there is another case—that of *Bagley v. Mollard**—in which Sir John Leach, Master of the Rolls, expresses himself to this effect:—

In the case of *Wilkinson v. Adam*, the common law judges, who assisted Lord Eldon, seem to have entertained an opinion, that illegitimate children, who were described in the will, might take jointly with legitimate children, under the general description of "children;" but Lord Eldon was plainly not of that opinion, and I entirely concur with him in thinking that, whenever the general description of "children" will include legitimate children, it cannot also be extended to illegitimate children. In *Wilkinson v. Adam*, the illegitimate children were described to be illegitimate in the will, which is not the case with respect to *Elizabeth Mollard*; but I am of opinion that this circumstance makes no difference in the case.

Now what is the case here? Is that paper entitled to be described as a codicil which is not a codicil, and can only be made a codicil in law by the confirmation and ratification of this instrument? Can I say upon the face of this instrument, seeing what the testator has done at earlier periods, confirming wills and codicils which did not at that time require ratification and confirmation, that by using the word "codicils" he meant to include those which were not codicils? Can the law permit me to put that interpretation upon it that, within the same term of "codicils," be included that which is legally and properly speaking a codicil with one which is not entitled to that description? Can I understand the same term to give effect to a legal instrument and to one not legal, and which can only be a legal instrument by confirmation? I feel great difficulty, in the situation in which the Court is placed, in having to decide

* 1 Russ. & Mylne, 581.

question of such great importance. Here is a large money disposed of by these codicils—3,000 shares in t and 100,000 dollars in another concern. Still, al-
 t be probable that the intentions of the testator may
 ted, the Court must decide the question according
 ew it entertains of the law ; and my opinion is, that,
 ese papers are so distinctly referred to as to leave
 t as to what the intention of the testator was, upon
 ority of *Smart v. Prujean* and other cases, I cannot
 these papers are entitled to probate. I am of opi-
 t the Court cannot put that construction upon the
 codicils" so as to include those papers which were
 uted according to the provisions of the law, and I
 efore under the necessity, however reluctantly, of
 to the conclusion that I must pronounce that these
 pers are not entitled to the probate of the Court, as
 not executed according to the provisions of the Act
 ament, and the subsequent ratification by a regu-
 ecuted instrument is not sufficient to give them
 d operation.

respect to the paper of May, 1840, there is no rati-
 of that ; the codicil ratifying and confirming the
 codicils is dated in April, 1839, and, consequently,

have no prospective operation upon codicils exe-
 terwards. The course I must take in this case is,
 these two Allegations.

ct the Allegations, and decree the expenses to be
 of the estate on all sides.

rs:—*Bowdler*, for Mr. Croker ; *Orme*, for the Countess
Ferraris ; *Fox*, for the executors.

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Co. Ferraris v.
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High Court of Admiralty.

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A vessel, sued for bottomry, as well as for wages, pilotage, &c., is arrested and sold; conflicting claims upon the proceeds of the ship and upon the freight arise, various parties having adverse interests in the two funds, the ownership of the vessel and the freight being in different parties:—
Held, that the assignees of a bankrupt owner have an interest to appear;—that the assignment of his shares in the ship by a bankrupt owner to a creditor did not exempt those shares from *lien*; that the freight, though assigned by deed, is liable to the bond ratably with the ship; the same rule generally applies to pilotage, wages, and towage; therefore, that this bond, with pilotage, wages, and towage, must be paid propor-

THE “DOWTHORPE.”—*Act on Petition.*—This was a case of various complicated and conflicting claims upon the proceeds of the ship and freight. The *Dowthorpe* being at Singapore, in March, 1842, bound for London, the master gave a bottomry bond on the ship and freight for £1,757. 10s. This bond was pronounced for in this Court without opposition, and the ship was arrested and sold (at the suit of the pilot), the proceeds amounting to £2,621. 9s. 8d. The *Dowthorpe* was owned by Thos. Humphrey, sen., and —Lofty, the master, the former holding 48 parts, the latter 16. The freight amounted to £1,079. 7s. 1d.; part (£767. 10s. 11d.) was paid into the Registry; for the rest (£311. 16s. 2d.) bail was given. Proceedings were also had against the ship for pilotage, towage, and seamen's wages, amounting together to £491. 5s. 5d. There being two proceeds for payment of the bond, the pilotage, &c.—namely, those of the ship and the freight—the question was, whether those demands should be thrown exclusively upon the one or the other, or on both together, and in what proportion. In ordinary cases, as the owners of the ship and freight are generally the same, no such question arises; but in this case it was alleged that the beneficial interest in the proceeds of the ship was in one party, and the right to the freight in another. On behalf of the assignees of the freight, their interest was stated as follows:—That an indenture was made on the 12th May, 1842, between Thos. Humphrey, of the first part; John Nicol, of the second part; and Burnie and Co., Horton and Alder, Gibson, Linton, and Whiting, of the third part, which recited that Lofty, the master, in 1841, being then at the Cape of Good Hope, induced Dickson, Burnie, and Co., to furnish supplies, &c., for which he drew bills, in September, 1841, amounting together to £620. 1s. 6d., on Nicol and Co., the ship's agents. Dickson, Burnie, and Co., endorsed the bills to Wm. Burnie and

Nicol and Co. accepted the bills, but did not pay them. Pease and Alder held two other bills of exchange (one for 15s. 9d., the other for £243. 7s. 11d.), also accepted by Pease and Co. for supplies to the *Dowthorpe* and also to the *Fortitude*, another ship belonging to Thos. Humphrey, the bills were dated in October and November, 1841. The bills were not paid when due. Gibson, Linton, and Co. discounted a bill due 20th April, 1842, for £159. 19s. 6d., indorsed by Nicol and Co. for insurances for Humphrey. They then set forth a charter-party, dated 8th January, 1842, by Nicol and Co. for Humphrey and Lofty, with Jopp and Farr, to bring goods from Singapore to London; that the ship was then on her homeward voyage; that Humphrey, the owner, had agreed with Nicol and Co. to assign the residue of the ship to Wm. Burnie, and Horton, and Linton, first, to cover the expense of the deed; secondly, the wages of the crew; thirdly, bills of exchange, and a sum of £142. 2s. 6d., the residue of the surplus to be paid to Nicol. The prayer of this party was that the ship might pay the bottomry bond and all demands, and the freight be paid to Burnie and Co., Horton and Alder. The assignees of Thos. Humphrey, Thos. Humphrey and Thos. Humphrey the younger appeared and shewed an indenture of August, 1841, whereby Humphrey the elder assigned to Pease and Co., bankers, of Hull, his interest in the ship, together with other property, to secure them for any monies due from the firm of Humphrey the elder, or from Humphrey, sen.; that Pease and Co. had advanced for £14,484. 17s.; that, after receiving what was due out of the joint estate, they would have a right to set off against themselves of the separate security; they alleged that the ship was equally liable for all the charges, and that the freight was to be exclusively paid out of it, and prayed judgment accordingly. It was urged that the parties, save the bondholders, had proceeded against the ship only. If Humphrey the elder had been solvent, the 48 shares would belong as a cargo to Pease and Co., and the freight, less the wages of the crew, to Burnie, and the other assignees of the freight under the deed of 12th May, 1842. It was a question whether all the demands sued for were or might have been made

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tionably out of the whole proceeds of the ship and freight, the assigned shares of the freight indemnifying the bankrupt owner's estate on that account. *Obiter*: the residue of the assigned shares of the ship would belong to the creditor to whom assigned; the residue of the assigned shares to the owner of the 16 parts; the residue of the freight of the assigned shares to the assignees under the deed of 1842, and the residue of the 16 parts to the owner of those parts. *Semble*, where the ship and cargo only are hypothecated, the freight may be required to contribute, and that ship and freight must be exhausted before recourse can be had to the cargo.

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available against both the ship and freight : in point the only proceedings against the ship and freight was for recovery of the bond. It was a question, likewise, whether the 48 shares were partnership property, or the property of Humphrey, sen.: in the latter case, how affect Humphrey's estate.

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ARGUMENT.

Haggard, D., for the assignees of the freight-shares are the private property of Humphrey, sen., and made security for the joint debt to Pease and Co. Will they have the assignees of the bankrupt? They have no right to represent Pease and Co. Could Humphrey sen., having assigned the freight, come here against his own assignment and pray that the Court would make the freight liable? Pease and Co. have proved their debt against the general estate of Humphrey. Is it the separate security to affect or enlarge the fund of the assignees of Humphrey and Co.? The assignees under the deed of May, 1842, are creditors of Humphrey the senior and not of the firm. [Cited the "*Percy*."*]

Harding, D., on the same side.—On the principle of law of agency, Lofty was represented by Nicol. I have drawn bills. The assignment was beneficial to Lofty. The interest have the assignees of Humphrey in the ship? Generally, a creditor must bring in his separate security. He can come in *pari passu*. The Court has no knowledge of the nature of the separate security: it may be none. If the assignees must pay the same dividend, what can it signify to them?

Addams, D., for the assignees of the joint estate of Humphrey and Co.—The ordinary course is said to be to pay out of the proceeds of the ship; that is, because they both belong to the same owner. The master has a right to encumbrance both ship and freight.

Bayford, D., on the same side.—These parties making payment are creditors on certain bills of exchange, the freight assigned to them to pay the debts of Humphrey, sen. The Court cannot pay out the whole of the freight unless there is something to shew that Nicol

authorized to represent Lofty to assign the freight to other demands. *Re Clanricarde*; * *Ex-parte Parr*; † *Re Goodman*.‡

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Re Goodman, D., appeared for the bondholder.

THE CURIAM.—I must take time to consider this question. *Cur. adv. vult.*

LUSHINGTON.—The funds, respecting which the pre-tigation arises, consist, first, of the proceeds of the ship, March 24.
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amounting to £2,621. 9s. 8d.; secondly, the freight brought to the Registry, amounting to £767. 10s. 11d.; thirdly, the freight for which bail was given—viz. £311. 16s. 2d., the amount of freight being £1,079. 7s. 1d. Against these there are the following claimants: first, the amount of bottomry bond, amounting to £1,757. 10s.; secondly, demand for pilotage, towage, and wages, £491. 5s. 5d., and the Proctors' bills: in all, £2,248. 15s. 5d. The proceeds of the ship alone exceed all these demands.

It may possibly be necessary hereafter to consider whether as to the fund for payment, there is any distinction between the bottomry bond and other demands; but I shall postpone those questions until I have brought under examination the titles or claims to the ship, or the proceeds of it, which are now in a legal view the same thing, and to the court; remembering, also, that I am now first to determine what funds the demands shall be placed, and not to see if any residue may be paid out.

With regard to the ship, the facts appear to be, that she was built at Stockton in the year 1837; that, some time in 1841, Thomas Humphrey, the elder, was the owner of the ship. Claims on the ship.

He carried on business under the name of T. Humphrey, the elder, and T. Humphrey, the younger, but that these forty-eight shares of the *Dowthorpe* were not the property of that partnership, or of any other in which Humphrey, the elder, was engaged, but a part of his private estate; that the firm of Humphrey and Son had an account with Pease and Co., bankers, at Hull, who made advances to Humphrey and Son; to secure these future advances, and also advances to Humphrey, sen.,

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alone, or other firms in which he was a partner, these forty-eight shares were assigned to Pease and Co.

Thus matters remained, save probably with variation as to the amount of the debt, till June, 1842, when Humphrey and Son became bankrupt. At that time, there was due to Pease and Co. £14,484. 17s. Mr. Wormald and others were appointed assignees of Humphrey and Co., and they are the parties now appearing in Court and seeking to prevent the proceeds of the ship from being made the sole and primary fund for the liquidation of all demands. No appearance has been given by Pease and Co., and some doubts were thrown out in Argument as to the interest of the assignees of Humphrey and Co. to appear and make the prayer they have done.

The first question, then, is, as to their interest. Now, interest to give a *persona standi* is not a certain, positive right to a given sum of money; but if a person may be, or can be, injured by a decree in a suit, he has a right to be heard as to the decree, though, from the state of the funds, it might eventually turn out that he could take no benefit. Nor does it at all follow, because Pease and Co. may have an interest and do not appear, that, therefore, the assignees of Humphrey and Co. have not an interest also. I am clearly of opinion that, in every view of the case, the assignees of Humphrey and Co. have an interest to entitle them to appear and protect this part of the fund—namely, the forty-eight shares of the ship. 1. The assignees have the legal interest, and are entitled to the equity of redemption in these forty-eight shares, or to the surplus, after paying the debt: it is no answer to say there will be no surplus, for that is a fact only to be ascertained by the final result. 2. Pease and Co. have proved the debt of £14,484. 17s. against the joint estate of Humphrey and Co., claiming to avail themselves of this very security to liquidate any demand which may remain after receiving the dividends, as unquestionably they are entitled to do, the security being on the separate estate of one of the partners. Now, if the dividends and the produce of the security should more than liquidate the debt, the assignees would be entitled to the

Assignees of
Humphrey and
Co. have an in-
terest.

surplus ; they are, therefore, clearly interested in protecting the proceeds of the ship—they have a beneficial interest. The assignees would, indeed, equally have had an interest, though somewhat different, had the forty-eight shares belonged to Humphrey and Son, and not to Humphrey *sen.* done ; for, in that case, though Pease and Co. must have realized the security before they could have proved, yet the greater the amount which the security fetched, the less the dividends out of the estate:

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These questions appear to me of very easy solution ; but those which remain behind are not so easily disposed of.

The next question I apprehend to be this:—What was the nature and extent of the right vested in Pease and Co. by the assignment ? As against Humphrey the elder, they had, so long as he was solvent, a perfect right to retain or apply the security by sale for the liquidation of their debt, and that free from any demand afterwards accruing. The ship, indeed, as to third parties, would be primarily liable ; but he must have made good to Pease and Co. any demand against the ship in another shape, for he must have paid from his own funds so much of his debt to Pease and Co. as the security did not satisfy. But the bankruptcy of Thomas Humphrey raises the difficulty, and that difficulty may assume various shapes.

What right was given by the assignment of 48 shares.

That the ship, in whosever hands she may be, or whoever as an interest in her, is liable to *liens* subsequently accruing, there can be no doubt—such *liens* as salvage, bottomry bonds, and seamen's wages ; they are *liens* on the ship in the strictest sense, and those who take such security must take it subject to such incumbrances as the law may impose upon it or the benefit of third persons. It is not denied that the ship must bear at least its share of these *liens*, except, perhaps, under the peculiar circumstances, the seamen's wages. The question is, whether the burthen shall be spread according to the proportionate amount over ship and freight.

The preceding observations apply to the forty-eight shares of the ship mortgaged to Pease and Co. ; the remaining sixteen, so far as appears, are the property of Lofty, the master. There has been no appearance on behalf of him, but

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the process of the Court having been served upon the ship itself, he must be held to be legally cognizant of all the proceedings. At the same time, the Court is equally bound to protect his interests as if he were present himself, or by a Proctor and Counsel appearing to protect him.

The freight.

With regard to the freight, it is claimed by virtue of an assignment dated the 12th May, 1842; and, for the sake of simplifying what appears complicated, I will assume, first, that the *whole* freight has been duly assigned to the assignees named in the deed, and that for debts incurred on account of the ship. In the course of the argument, reference was made to the case of the "*Percy*," which I shall refer to presently, and to the difficulty which Sir John Nicholl felt in allowing the mortgagees of the ship to interfere. Now, the difficulty as to permitting such assignees of the freight to appear in this Court is of the same kind as those formerly offered to an appearance by mortgagees of a ship. This difficulty has not been insisted on in the present case, and very properly so, for, seeing that the Statute has relieved the Court from all the obstacles which formerly existed as to the title to the ship by mortgage, even if such obstacles did exist, which I somewhat doubt, I think that incidentally I necessarily have the same power in such a case as this as to the freight, for, otherwise, I never could determine the amount of the net proceeds of the ship itself; and, moreover, I think I am bound to take this view of the case, so far as I am able, without exceeding the jurisdiction of the Court; for if I can dispose of all the questions now raised so that the beneficial interests should finally be preserved to all parties, it is my duty to do so, and thereby prevent ruinous litigation. Having all the funds in the Court, I consider I have the power of so dealing with them.

Is the ship to be considered the exclusive fund?

Then, assuming, as I have said, that the whole freight has been duly assigned to the persons named in the deed of 1842, as a security for the payment of debts, on account of the ship, is the freight to be exempted from all liability to the payment of a bottomry bond until the proceeds of the ship have been first exhausted? And, if so, on what principle is the ship to be considered the exclusive fund?

Now, what is the first and general principle which ought to regulate all liability to pay, or bear burthens? I conceive, the liability to pay ought in equity to be governed by benefit received. He who takes a benefit should bear his share in the burthens. In bottomry transactions, where, as commonly the case, the ownership of the vessel and the freight is in the same person, no question can arise of this distribution; but where those interests are severed, the principle remains applicable. The ship and the freight are both shared or benefited by the bottomry transaction. It is essential to a legal bottomry bond that it should be so; then why, when the ship is transferred, as a security or otherwise, to B., and the freight to C. D., should the whole of the subsequent *lien* be borne by A. B.? Justice does not appear to lead to that conclusion.

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Having considered the question on principle, I look at cases which have been decided, to see if they are opposed to the application of the rule which considerations of justice call upon me to apply.

The only case cited is that of the "*Percy*." In the first place, I think that case was decided, or at least founded, chiefly on the ground that the applicant was a mortgagee. As true, Sir John Nicholl used general words, without giving the qualification; but I think in fairness he cannot be considered as going beyond the circumstances of the case. That case did not require him to say what should be done where the ownership of the ship and freight was not in the same person. The case was in substance this:—A warrant of arrest in a cause of bottomry was executed against the ship and against the freight, and no appearance being given, the ship was sold and the proceeds were paid into the Registry. An appearance was then given for two merchants, Duba, as owners of the ship, claiming the balance, and for a mortgagee of one-fourth of the ship, who moved the Court for a Monition to bring in the freight, but the Court refused this application. An appearance was then given for a party alleging himself to be mortgagee in trust for himself and others of one-fourth of the ship and freight. The part of the two mortgagees, *caveats* were entered

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against the payment of the proceeds to the bondholder, who applied for the amount of his bond. Sir John Nicholl was of opinion that a mortgagee of a ship had not such an interest as to entitle him to appear in this Court. Now, I confess I have great doubt whether that proposition be not carried too far. That a mortgagee cannot initiate a suit is one thing, but that he cannot appear to protect his interest when a suit is commenced, is another question. However, Sir John Nicholl said:—"The freight is part of the bondholder's security, but he is not compellable here to enforce it. I am not aware that this Court has taken up questions of this kind as between mortgagees and owners; if it is bound to enter upon them, the mortgagee should get an injunction to bar the payment of the existing proceeds to the bondholder; but unless the Court is so stopped, I adhere to the opinion that he is entitled to have his bond and interest paid out of the sale of the ship, and that a mortgagee has no right to impede the payment."

It is evident that the result of this doctrine, if carried to its full extent, must be, that, in any case where there is a mortgage of a ship (and mortgages of ships are of every day's occurrence), if there should be a suit against the ship for mariners' wages, the ship must be sold. I shall refer to a case which establishes a different doctrine, and it is most probable that, at the time Sir John Nicholl decided the case of the "*Percy*," he was not apprized of a former case before Lord Stowell. I think, therefore, that the case of the "*Percy*" is not to be considered as an authority against the application of the equitable principle which I am discussing.

Now, the case to which I am about to refer, was a decision of Lord Stowell in the year 1821, and, to the best of my belief, it has never been reported. But I was Counsel in the case, and I have referred to my own notes, and to the original papers. It was the case of the "*Prince Regent*," and it appears to me to sustain completely the principle which I think applicable to the present case, and it decided some important questions.

In that case, the bond was upon the ship and cargo only,

not mentioning the freight. The ship and cargo were arrested, and the freight was paid over to other parties, before my decision as to the suit of the bondholder. The ship was insufficient to pay the bond, but the cargo was more than ample. In May, 1821, Lord Stowell decreed that the bondholder should be paid the balance of proceeds of the ship, wages deducted, and be put in possession of the cargo so far as necessary for the payment of the bond. Now, mark the extent to which he altered his decision. The owners of the cargo—that is, the owners of that part of the property under hypothecation—prayed a Monition against the owners of the freight—that is, of a part of the property not specifically hypothecated—which gave rise to an Act on Petition, the holders of the freight resisting, and their defence was, that the freight was not bound, not being named in the bond, and that it had not been arrested at the suit of the bondholder, as the bondholder had not proceeded against the freight. Lord Stowell ultimately required the freight to be brought in, and pronounced it to be subject to contribution in discharge of the bond, together with the ship and cargo. The decree is to the effect I find stated in my note: the Court pronounced for the bond, with interest and costs, and directed the freight to be brought in, and to be subject to contribution, and refused to decree costs against the owners of the freight.

This was the ultimate result of that case, and I will state how it bears upon the present case. First, it shews that, where the bondholder has, directly or by intendment of law, a *lien* on ship, freight, and cargo, the owner of one may, without the bondholder's consent or movement, have the aid of the Court to bring the other security in for contribution; and secondly, that the Court will apportion the liability.

In this case of the "*Prince Regent*," in June, 1822, a subsequent question arose, and Lord Stowell decided that the ship and freight must be exhausted before recourse could be had to the cargo. But in this decision he made no departure from his former judgment as to the ship and freight; and moreover, this determination of Lord Stowell is quite

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Held by Lord Stowell that the freight (not hypothecated) of a vessel on which, with cargo, a bottomry bond had been given, was liable to contribute to discharge the bond.

Also, that ship and freight must be exhausted before recourse can be had to cargo.

MARCH 24. consistent with the limited interpretation I put upon the judgment of Sir John Nicholl in the "*Percy*," and in conflict with the more extended construction.

For these reasons, therefore, the justice of the principle and the authority of Lord Stowell, I am of opinion that, in all ordinary cases (there may possibly be exceptions from peculiar circumstances), where the ship and freight belong to different persons, a bottomry bond should be paid by both rateably, and it is this rule that, as far as I can, I shall apply to the present case.

Effect of that decision:—where ship and freight belong to different persons, a bond must be paid by both rateably.

Pilotage, wages, &c.

Liable to exceptions.

Where the whole freight does not belong to same parties.

With regard to the pilotage, wages, and towage, I see no reason why the same principle should not apply in this case, though I must guard myself against saying that it will in all cases. The exertions of the pilot and seamen contribute as much to the realizing the freight as to the protection of the ship. The reason why I say, "I guard myself against saying that the rule will apply in all cases," is, because there will be cases in which the freight may be paid beforehand, and if so, that may make a difference. There are other cases which may be exceptions, and it is to prevent misunderstanding hereafter I say that the rule will not apply in all cases.

It will be recollected that I have hitherto considered the case on the assumption that the whole freight, without any restriction as to its application, belonged to one set of assignees; but, unfortunately, such is not the case here, and hence, indeed, have arisen all the real difficulties I have had to encounter in the case. I confess the appearance of these difficulties at first almost disposed me to have applied the principle generally, without regard to the peculiar circumstances arising from the deed of May, 1842. But, if I did so, I think it would have the effect only of postponing the evil day, and that the same difficulties would arise, when the balance of the two funds in Court should be demanded, and in a still more complicated shape, or I must have retained the funds till a suit in Equity had commenced and a judgment been given. I consider it my duty to avoid these serious consequences, if possible, and I shall therefore at once address myself to the deed of May, 1842.

Now, as the freight must be divisible amongst the owners in proportion to the shares they respectively had in the ship previous to the execution of that deed, Thomas Humphrey, the elder, must have been entitled to forty-eight parts, and Loftly to sixteen parts, of the freight, as they held that number of shares of the ship. The deed of 1842 purports to assign the whole freight, but the parties to it, besides the assignees, are only Humphrey, the elder, and Nicol, the broker. That Humphrey, the elder, could assign more than his forty-eight parts, is not, and I think cannot be, contended; but it has been urged that Nicol was the ship's broker, and that he, as such broker, was, for such purpose, authorized to pledge the freight. For this position, I know of no authority whatever; surely, it does not follow that a broker, employed to obtain a charter for a vessel, can assign the freight to other persons: such a doctrine is to me wholly new, and would go a length which evidently is inconsistent with the protection of the interests of British ship-owners.

But it is said that the deed may be supported as against Loftly, because the assignment was for the protection of Nicol, who was a creditor of all the owners of the *Dowthorpe* for supplies and moneys advanced. Now, be it so, and assume that the moneys advanced were solely on account of the ship *Dowthorpe*; will that circumstance enable Nicol, the creditor, to assign for his own protection or otherwise the property or rights of his debtor without his consent? Can a personal creditor without authority take or assign the property, be it freight or any thing else, of his debtor? I never heard of such a proposition, and cannot believe it to be well-founded. The deed itself inclines me to think that the parties to it might be cognizant that the whole interest in the freight was not assigned, for there is a covenant for further assurance. But, independently of this clause, there

is no reason to conclude that Loftly is bound by the deed itself. For these reasons, I am of opinion that Loftly's share in the freight was not duly assigned by this deed.

If this be so, what did pass to the assignees by the deed of 1842? The forty-eight shares of the freight, to be ap-

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Loftly's share
in freight not
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plied according to the covenants of the deed. And here another question arises, with respect to the payment of wages out of the freight: the assignees take expressly upon the condition of so applying the freight, after paying the expense of the deed. I have been asked to disregard this provision in the deed; but I have not been told for what reason. The original right to these forty-eight parts of the freight was in Thomas Humphrey, the elder; all that remains of that right not parted with by the deed of 1842 is in the assignees of Humphrey, sen. The assignees under the deed of 1842 can have no greater right against the assignees of Humphrey, now he is a bankrupt, than against Humphrey himself before. Humphrey had a right to require the stipulations of the deed to be fulfilled, and so have his assignees. I do not see that his assignees can be placed in a worse situation than Humphrey himself. In what way are the assignees under the deed damnified? They took the freight subject to a condition—that of paying wages, and also subject to all the burthens which the law might impose by subsequent *liens*; they will now receive the freight, deducting the wages, which was a condition annexed to their title, and deducting the proportional part for the discharge of a *lien* imposed by law.

Result.

Now I propose to deal with the property as follows:—The amount of the bond, together with the pilotage and towage, must be paid proportionably out of the whole proceeds of the ship and freight. I think the wages must be borne by the remainder of the forty-eight shares of the freight, so far as to indemnify Humphrey, sen., or his estate, from any liability on that account; but Lofty, being no party to the deed, is not entitled to be benefited by it. The wages, therefore, must be paid in the first instance out of the proceeds of the whole ship and freight proportionably. But the forty-eight parts of the freight under the deed must indemnify Humphrey, sen., or his assignees. Lofty must bear his share of the wages and costs, as owner of sixteen shares of the ship and sixteen shares of the freight.

It may be convenient that I should state—not delivering a final judgment on the point, but for the purpose of afford-

ation that may prevent litigation—what probably the disposition of the fund will be. The residue of eight shares of the ship will belong to Pease and upon further information the Court should be pay it over to the assignees of Humphrey and her of Humphrey, sen. The residue of the six of the ship will be payable to Lofty, or, if he be bankrupt (as suggested at Bar), to his assignees. Of the forty-eight shares of the freight will be the assignees under the deed of 1842. The residue sixteen parts of the freight will be payable to his assignees, if he is a bankrupt.

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apprehend, will be the ultimate result of the principle the Court deems applicable to this case; but I beware of the extreme complication which it necessitates, and that I may have erred in the details, or have expressed my opinion with sufficient clearness on these reasons, I shall direct this decree not to be read one week, to give all the parties interested time to consider it. If any party think such decree will be unjustly prejudicial to his interests, and shall come in same into the Registry, stating briefly the objections, I will immediately appoint a day to hear them, it is fully understood that no objection to the general principle of apportioning the *liens* on the ship and freight is open to discussion, but only any necessary variation from the peculiar circumstances of this case.

I only repeat, that it would have been a great relief had I could have confined my judgment to the proposition that the bond and other *liens* should be paid off the ship and freight proportionably; but I could not foresee the result of so doing. I should have reflected at the expense of the suitors; for the result might have been, either that the balance of proceeds of ship must have remained in the Registry to await the result of a suit in Equity, or all these questions must have been agitated upon motions to pay out the proceeds. There are still every other remedy open, notwithstanding my opinion.

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I do not wish unnecessarily and prematurely to raise any question of that kind which can arise, but they have been necessarily considered in the present litigation, directly or indirectly—at least, all the points on which I have pronounced an opinion.

Costs.

The result is, that the costs of the bondholder were paid out of the proceeds; as between the other litigating parties, I shall give no costs.

Proctors:—*F. Dyke*, for the assignees of the freight; *L. Gostling*, for the assignees of Messrs. Humphrey; *Gostling*, for the holder.

Archbishop of Canterbury.

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Church-rate.
—A rate made by the churchwardens, with the minority, in vestry, after it had been refused by the majority, held to be a valid rate:—judgment of the Consistory Court of London, to the contrary, reversed.

VELEY AND JOSLIN v. GOSLING.—*Appeal.*—*Libel*

This was an appeal from the Consistory Court of London on the rejection of the Libel in a suit for subtraction of church-rate, by the churchwardens of Braintree, Essex, a rate being made by them and the minority of the vestry, the majority having refused the rate, and the Judge of the Court below holding a rate so made to be invalid. The facts of the case are detailed in the report of it before the Court below,* and in the Judgment.

In Mich. T. 1842 (Nov. 19), *Sir John Dodson*, Q. A., *Haggard*, D., were heard for the Appellants; *Addams*, for the Respondent.

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JUDGMENT.

SIR H. JENNER FUST.—This is an appeal from the Consistory Court of London, where it was a cause of subtraction of church-rate, brought by the churchwardens of the parishes of Braintree, against an inhabitant and parishioner. Citation was taken out in the cause in January, 1842, and a Libel was given in, which came on for discussion before the learned Judge of the Consistory Court, who, having taken some time for deliberation, arrived at an opinion

* 1 Notes of Ca. 457.

the Libel was not entitled to be admitted, and on the 1st May, 1842, he accordingly rejected it. From this rejection of the Libel the present appeal has been brought. The cause was argued here some time ago, and the Court thought it due to the importance of the case to take time for deliberation, in order to arrive at a correct decision. The arguments before this Court were pretty much to the same effect, though not so extended, as those which had been adduced in the Court below, and the case is now before this Court for decision.

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The parish of Braintree has obtained a considerable degree of notoriety from the determined opposition given by the great majority of its inhabitants to church-rates, and it is well known that a question as to the validity of a church-rate in that parish, in 1837, gave rise to very elaborate arguments in the Courts of Common Law, as well as in the Consistory Court of London, and it is admitted on all hands, that the present proceedings grew out of, and were immediately connected with, those in the former case, and therefore, before the Court proceeds to consider the contents of the Libel, it will be right, and not inconvenient, to see on what points the decisions in the Consistory Court of London, the Court of Queen's Bench, and, finally, in the Court of Exchequer Chamber, turned in that case, in order that the Court may ascertain whether there is any real and substantial difference between the present case and that which has been decided.

It appears that the former proceedings commenced in 1837, in the Consistory Court of London, and that the same gentlemen who are now churchwardens sued then in the same capacity; but the party then proceeded against was Mr. Burder, who was an inhabitant of the parish, as well as Mr. Gosling, the defendant in this suit. In that case, the sum sought to be recovered was £37. 18s. 2d., the proportion of a church-rate due from him upon an assessment, at the rate of 3s. in the pound. This rate was made, as alleged, on the 6th June, 1837, and was stated to be for the necessary repair of the church and for other expenses incidental to the office of churchwarden. A Libel was given

The former
Braintree case.

MARCH 25. *Veley v. Gosling.* in, in the usual form, pleading the nature of the repairs which were required; and that a notice had been given of a vestry meeting, to be held on the 2nd of June in that year; and that, according to that notice, the meeting was to be held to take into consideration the making of a rate for the repair of the church; that, at that meeting, a schedule of the repairs which were requisite was produced, together with an estimate of the expense, which amounted to £508. 12s. for the repairs of the church, and that, besides this, incidental expenses were stated to have been incurred, amounting to £23. 18s.; so that the whole amount, stated to be absolutely and indispensably necessary, was £532. 10s. The Libel pleaded that no objection was raised, either to the necessity of the repairs, or to the amount of the estimate, or to the sum proposed to be raised; and that a proposition was made that, in order to raise the funds necessary to meet these expenses, a rate of 3s. in the pound should be granted; that when the question was about to be put, however, an amendment was moved, to the effect, for the reasons therein stated, that the consideration of the question of church-rate be postponed to that day twelve months, which was in effect a proposal for the direct refusal of the rate, and was so considered on all hands; that this amendment, on a show of hands, was carried by a very large majority; that a poll was demanded, and was taken by ballot on the 5th and 6th of June, and the result was to confirm the amendment which had been carried by show of hands. Now, this resolution being a virtual refusal of any rate at all, the meeting dissolved, and there was an end of the proceedings: a rate was proposed, an amendment was moved to the effect that there should be no rate, and that amendment was adopted by a show of hands, and afterwards confirmed by a ballot. The churchwardens, however, as appeared from the Libel, met together in the vestry-room of the parish, on the 10th June following, four or five days after, and, without any further notice to the parishioners, proceeded to make a rate of 3s. in the pound on the value of all messuages, lands, and tenements in the parish, which it was calculated would produce a sum of £488. 10s. 4d.

ards the estimated amount necessary for the repairs of the arch and incidental expenses. Mr. Burder's proportion his rate amounted to £37. 18s. 2d., and, on his refusing to pay that amount, the churchwardens instituted proceedings against him. The admission of this Libel was opposed; the question was argued at considerable length in Consistory Court, and the judge was of opinion* to admit Libel, being governed and bound, as he expressed him-

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by a decision which was cited in the case of *Gaudern elby*,† as being the sentence of a superior Court; intimating at the same time that, if he had been at liberty to follow his own course, his decision would have been different—that is, that he would have rejected the Libel, the rate being valid by law. The result of the case was, that, Libel being admitted, a motion was made to the Court of Queen's Bench for a rule to shew cause why a Prohibition should not issue to the Consistory Court of London, not proceeding to enforce that rate, and a rule *nisi* having been granted, the Consistory Court was, of course, restrained from taking any further steps until the question of prohibition was disposed of. Some arrangements took place in the Court of Queen's Bench, as to the mode in which the question should be brought before the Court, and it was finally agreed that the plaintiff should declare in prohibition, and that a demurrer should be offered to the declaration, in order to bring the question clearly before the Court; and it was further agreed by the leading Counsel on both sides, that the points to be argued should be, the validity of the rate, and the power of the Court to issue a writ of prohibition: and a rule to this effect was signed by the active Counsel on the 23rd November, 1837. The defendant came on for argument in Trinity Term, 1839, on the 31st of May and 5th of June; and the judges who sat on those occasions were Lord Chief Justice Denman, Mr. Justice Littledale, Mr. Justice Patteson, and Mr. Justice Williams. On the 1st of May, 1840, Lord C. J. Denman gave judgment in favour of the plaintiff in prohibition,‡ de-

* 1 Curt. 372.

† *Ibid.* 394.

‡ *Burder v. Veley and another*, 12 Ad. & E. 244.

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The result of that case. From the nature of the proceedings in that case, and from the tenor of the judgment of the Court of Queen's Bench, if the Court of Exchequer Chamber had simply affirmed that judgment in all its parts, and had adopted all the reasoning of that Court, without giving any reasons of their own, then, probably, the case now before the Court would not have arisen. But Lord Chief Justice Tindal, in delivering the judgment which he was authorized to give by the seven other learned judges with whom he was associated, took care to state specifically the precise points which were decided by them; and the only points which they in fact decided were, that the rate, as it appeared on the face of the Libel, was illegal, as being made without competent authority, and that a prohibition ought to go to restrain the Spiritual Court from proceeding to enforce that rate. These were the points decided, simply:—that *that* rate was illegal on the face of it, and consequently that the Spiritual Court should be prohibited from proceeding to enforce it. On looking at the Libel, it appeared that the illegality consisted in this—that the vestry of the parish, having been duly

The points decided.

* *Veley and another v. Burder*, 12 Ad. & E. 300.

summoned, had refused to grant a rate; that the churchwardens had, three or four days afterwards (the termination of the ballot was on the 6th June, and the churchwardens met on the 10th), of themselves, made a rate, without giving any further notice to the parishioners. The question which was decided by the Exchequer Chamber, as stated by Lord Chief Justice Tindal, was, "Whether the churchwardens of a parish, after a rate for the necessary repairs of the parish church has been proposed by them to the parishioners, at a vestry meeting duly convened for that purpose, and has been refused by a majority of the parishioners there assembled, can, of their own sole authority, at a subsequent time, by themselves, and not at any parish meeting, impose a valid rate on the parishioners?" And in a subsequent part of his judgment, the learned judge says: "The question to be resolved with reference to this rate is, whether, after a meeting has been duly convened, and certain of the parishioners have attended, and the majority of those who so attend refuse to make any rate for the necessary repairs of the parish church, the churchwardens have authority, by themselves, and not at the meeting at which the refusal took place, but at a subsequent time, to make a rate that shall be binding on the parish?" Now, the limitation with which this question was decided, as stated by the learned Lord Chief Justice, is very remarkable. Having stated every point which appeared on the face of the proceedings in the case, he did not recognize it, as a general proposition, that, after a refusal of the parishioners to grant a rate, no rate could be made by the churchwardens, under any circumstances; but he confined the judgment of the Court to the simple point, that a rate having been refused by the majority, and the meeting having dissolved, the churchwardens had not authority of themselves, at a subsequent time, without notice to the parishioners, to impose a valid rate upon them. The Lord Chief Justice studiously guarded himself, in delivering the judgment he was authorized by his learned brethren to deliver, against going one iota beyond the point to which it was

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*Valley v. Gosling.*Limitation of
that decision.

MARCH 25. necessary to go in that particular case, which is apparent when the Judgment is regarded with particularity. The points decided in the Exchequer Chamber were clearly the same which had been decided in the Court of Queen's Bench—namely, the validity, the legality of the rate, and whether a prohibition ought to issue; and the opinions of both were the same—namely, that the rate was illegal and could not be enforced; but there was some variance, and that not of a trifling description, between the manner in which the question was stated in the Court of Queen's Bench and that in which it was stated by Lord Chief Justice Tindal. On reading the Judgment of Lord Denman, it would seem that, in his opinion, and that of his learned brethren, no valid rate could be made unless with the consent of the majority of the parishioners duly assembled in vestry. The whole tenor of his reasoning goes to that effect; and he states the question to be, whether the churchwardens had the power to impose a rate against the declared wish of the parishioners in vestry assembled. At the conclusion (p. 255), he says:—“The conclusion at which we arrive is, that the Court Christian was wrong in over-ruling the defensive Allegation of the parishioners, that the rate was made against the wish of the majority in vestry assembled, on the ground that this supposed church-rate was a nullity, as having been made by persons who had no authority to make one, in defiance of the declared dissent of the vestry; and that the Court decided erroneously in proceeding to give judgment for enforcing it.” Now, as I understand from this manner of stating the question, in the opinion of the Court of Queen's Bench, no rate could be made without the consent of the vestry, under any circumstances—that the churchwardens of themselves have no authority to make a rate at any time—that the refusal of the vestry is decisive and conclusive; and on these points there is no qualification or restriction of the proposition: the question is set completely at rest when the vestry shall have expressed its opinion. But the judges in the Court of Exchequer Chamber did not concur in such a general proposition, and did not express themselves in

such general terms; they were not called upon to affirm such a general proposition, and therefore they guarded themselves in the words I have cited. They thought it possible that a case might arise, in which a rate, though made against the express and declared opinion of the majority of the vestry, might be sustained, and though they gave no decided opinion upon that point, they reserved to themselves the liberty to form an opinion whenever the case should occur; and the point which they reserved to themselves was, whether a rate made by the churchwardens at the same vestry, duly summoned, wherein the majority of the parishioners had refused their assent to a rate, might not be a valid rate. Lord Chief Justice Tindal stated, as a reason why the Court should be at liberty to reserve the power of forming an opinion on such a question, that it was "obvious that there is a wide and substantial difference between the churchwardens alone, or the churchwardens and minority together, making a rate at the meeting of the parishioners where the refusal takes place," which is the present case, "and the churchwardens possessing the power of rating the parish by themselves, at any future time, however distant." This was the point with respect to which the Court of Exchequer Chamber reserved to themselves the power and the right to form an opinion, and the ground stated was, that there is obviously a wide and substantial difference between the two cases. It would seem that the possibility of such a case arising had suggested itself to the minds of the learned judges by the case decided in this Court by the late Sir W. Wynne, of *Gaudern v. Selby*, on which much observation was made in the Consistory Court, in the Court of Queen's Bench, and in the Court of Exchequer Chamber; and with respect to which the Court will hereafter make some remarks. The effect of the judgment of the two Courts was, that a prohibition issued.

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But the church at Braintree still continued in a state of great dilapidation, and the necessity for repairs becoming still more pressing than before, the churchwardens adopted a course suggested by the judgment of Lord Chief Justice Tindal, as a mode in which it was possible that a rate might be sustained,

Origin of the present case.

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Facts of the present case.

The rate now sued for was made on the 15th of July, 1841, and the Libel pleads, in the first instance, the necessity of the repairs ; that the church has been for some time past, and now is, in a dilapidated state, and in urgent need of repairs ; that no rate has been made for the purpose of its repair since the 1st March, 1834, and that from time to time the parishioners have refused to make any rate for the necessary repairs of the church. It pleads also, that the rate made on the 10th June, 1837, was the subject of proceedings in a former case ; that there the rate was proposed, but was rejected by the parishioners ; that proceedings were commenced in the Consistory Court of London, and that that Court was prohibited by the Court of Queen's Bench from enforcing the rate. It then pleads that, on the 13th May, 1841, a vestry was assembled for the purpose of making and granting a rate for the repairs of the church and for other expenses incidental to the office of churchwarden ; that the majority of the parishioners there assembled refused to make any rate ; that the church still continued in great and urgent need of repair ; that the churchwardens had no funds, wherewith to carry out such repairs ; and that, although an estimate of the repairs necessary to be done had been in former years submitted to the vestry, the rate had been refused. It then pleads that, on the 11th of June in the same year, an application having been made to the Consistory Court of London,* founded on an affidavit of the vicar of the parish, which described the condition in which the church was, a decree was granted against the churchwardens and the parishioners to shew cause why a Monition should not issue, calling on them to provide for the necessary repair of the church, and for the proper and decent performance of divine service, and to call a vestry on a certain day and at a certain

* 1 Notes of Ca. 170.

place, to make a rate for that purpose ; that the decree was turned into Court, and an appearance was given on behalf of the churchwardens, who expressed themselves ready to obey the directions of the Court, but that no appearance was given on behalf of the other parishioners, and no cause being shown why the Monition should not issue, a Monition did issue, commanding a vestry to be called, and directing the parishioners to proceed to make the rate. The Libel then recited, that the Monition was properly served, and that a vestry meeting was summoned by the churchwardens, which took place on the 15th of July, 1841 ; that at that meeting the parishioners and inhabitants attended in large numbers, and that the meeting was adjourned into the body of the church ; that a survey of the repairs necessary to be done and an estimate of their probable expense were produced to the vestry ; that, according to the computation made, a sum of £713 was necessary for the repairs of the church, and an additional sum of £20. 6s. for incidental expenses, making in all £733. 6s. ; that there was no dissent or no objection either to the necessity of the repairs, or to the amount of the estimate ; that in point of fact no objection was made on any of those grounds on which it was competent for the parishioners in vestry to object, and that an assessment of 2s. in the pound was finally proposed ; but that, the proposition having been duly made and seconded, an amendment was moved and seconded, to the effect, that the vestry were of opinion "that they were bound by every tie of social justice and religious principle not to grant the rate, and accordingly that no rate should be granted:" therefore, this was an absolute and peremptory refusal to make any rate at all ; there was no disposition to enter into a discussion whether the repairs were necessary, or whether the rate was excessive or not ; but a resolution was simply proposed that they should refuse any rate. The Libel goes on to plead, that a show of hands was taken, and the amendment was carried by a large majority ; that no poll was demanded, and that the resolution of the vestry, as declared in the amendment, was taken to be the final determination of the majority of the vestry that the rate should be refused. The fifth article of

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the Libel pleads that, while the parishioners still continued so assembled in vestry, the question was put, whether any other amendment was to be proposed, or whether there was any other proposition to be made, and that no affirmative answer was returned, and consequently no step was taken for the performance of the obligation cast upon the parishioners by the law, to repair the church and to provide what is necessary for the performance of Divine Service therein, and for the expenses incident to the office of churchwarden. The Libel then pleads, that the majority of the parishioners having refused to grant the rate, the churchwardens and others of the parishioners then present in vestry, the churchwardens being without the necessary funds to repair the said church, and the said vestry still continuing to be assembled, on the said 15th of July, in obedience to the Monition of the Consistory Court, and in discharge of the obligation cast on the parishioners of the said parish, the said parishioners being so in vestry assembled, rated and taxed all and every the parishioners liable to contribute to the church-rate, for and towards the necessary repair of the church, at the several sums mentioned in the rate, being after the rate of 2s. in the pound on the annual value of their property; and it goes on to plead, as if in contemplation of some objection that might be raised, that several of the parishioners were excused from payment of the rate on the ground of their poverty, and that the rate of 2s. in the pound was not more than sufficient to cover the amount of the estimated expenditure necessary for the repairs of the church. The Libel then exhibits in supply of proof the minutes of the proceedings at the vestry, and at those which preceded it since the year 1834.

The rate assessed in this case on Mr. Gosling amounts to about £33, and the question with respect to the admissibility of this Libel came on for debate in the Consistory Court: for Mr. Gosling, having been called on to pay the rate, refused, and, therefore, the usual proceedings were taken against him. Now I understand that, when the Libel was opposed in the Consistory Court of London, various grounds of objection were raised which were overruled by

at Court, and they were not pressed in this Court. The substantial question is this, whether a rate made under the circumstances here set forth is a good and valid and legal rate, and could be enforced by the Spiritual Court? It has been stated, with respect to the form of the Libel, that the machinery is rather cumbrous, but this objection being overruled in the Court below, it has not been thought right to press it here, and therefore the real and substantial question comes to this: whether a rate made by the churchwardens and the minority in vestry, after a rate had been issued at a vestry meeting duly assembled, in pursuance of legal notice, for the purpose of making a rate, can be enforced as a legal rate.

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The question in the present case.

Now the question being simply as I have stated, it is not necessary for the Court, in proceeding to give its opinion on this point, to go into any lengthened inquiry as to the nature and origin of the obligation on parishioners to repair the parish church, or into the origin or antiquity of rates for that purpose, because it appears to me that, though that discussion of inquiry may have been very important when the question first came under the consideration of the Court below, it would be superfluous to enter into such inquiry now, because the whole result of the arguments in the former case, and of the authorities cited on both sides, has been stated in a very clear and perspicuous manner by Lord Chief Justice Tindal, in delivering the judgment of the Court of Exchequer Chamber, which must be taken to be the result of all the authorities. His lordship stated, with respect to the nature of the obligation on parishioners to repair the churches, that it was an obligation of ancient origin by the Common law; and his words are these:—
“We are all of opinion, that the obligation, by which the parishioners, that is, the actual residents within, or the occupiers of land and tenements in, every parish, are bound to repair the body of the parish church, whenever necessary, and to provide all things essential to the performance of divine service therein, is an obligation imposed by the Common law of the land,” and that “such obligation is not founded on the force of the general ecclesiastical law.”

Obligation on parishioners to repair churches.

MARCH 25. By the general canon law, as he observes, the repairs of the whole church fell upon the incumbent of the parish, he receiving the whole emoluments; but by the Common law of England, the obligation of repairing the nave or body of the church is transferred from the incumbent to the parishioners. "No trace," he observes, "can be found in any of our books of an obligation on parishioners to repair the parish churches, throughout the whole of the realm, less wide and extensive than this. And as to the antiquity of this obligation, the case cited in *Argument from the Year Book*, 44 Edw. III., fol. 18, whilst it establishes the fact that church-rates were made by the parishioners at so early a period as 1370, does at the same time, by a plea therein contained of a custom from time immemorial, within the particular parish, to levy the amount of the rate on each parishioner by distress, necessarily carry back beyond the time of legal memory the obligation of the parishioners to make a rate upon themselves for the reparation of the parish church; and such a custom, existing beyond the time of legal memory, and extending over the whole realm, is no other than the Common law of England." His lordship then quotes L. C. Holt* and Ayliff,† in support of the position.

Now this authority is abundantly sufficient to authorize this Court to hold that the burthen of repairing the church is upon the parishioners, and that this burthen existed beyond the time of legal memory; therefore, it would be an absolute waste of time to enter into any further inquiry upon this point.

Extent of the obligation.

Then, this being the nature of the obligation, the next inquiry is, to what extent does it go—what is the effect of the obligation? We are told by the same authority, what indeed cannot be disputed, "that the repair of the fabric of the church is a duty which the parishioners are compellable to perform, not a mere voluntary act which they may perform or decline at their own discretion; that the law is imperative upon them absolutely, that they do repair the church; not binding upon them in a qualified, limited man-

* *Hawkins v. Rous*, Carth. 360. Holt, 139.

† *Parer*, 455.

only, that they may repair or not, as they think fit ; and where it so happens that the fabric of the church stands in need of repair, the only question upon which the parishioners, when convened together to make a rate, can by law deliberate and determine is, not whether they will repair the church or not (for upon that point they are controlled by the law), but how, and in what manner, the Common law obligation, so binding on them, may be best and most effectually, and at the same time most conveniently and agreeably between themselves, performed and carried into effect." Every word of this part of the judgment of the Lord Chief Justice is most important for the consideration of this Court ; it is deserving of the utmost attention, not only as coming from the very learned person by whom the judgment was delivered, but as conveying, in the most clear and lucid language, the state of the law and the extent of this Common law obligation, in the opinion also of his seven learned brethren whose judgment he delivered : for if I take it that the judgment of the Court of Queen's Bench was the unanimous opinion of the four Common law judges who sat in that Court, so this must be taken to be the unanimous opinion of the eight Common law judges who were associated to the Court of Exchequer Chamber, for the purpose of considering whether the decision of the Court of Queen's Bench was correct or not, and, therefore, I must consider that, in laying down this doctrine, Lord Chief Justice Tindal was fully authorized by the unanimous opinion of the seven judges in the Exchequer Chamber.

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The next question is, in what manner is this Common law obligation to be enforced? I do not think it necessary to go into the question whether this Common law was the *Commune jus laicum* or the *Commune jus Ecclesiasticum* : if the former, it would be proper for the temporal Courts to enforce it ; if the latter, it would fall within the province of spiritual Courts ; it is still the Common law of the land, and if it be the Common law of the land, as Lord Chief Justice Tindal says, " the parishioners have no more power to throw off the burden of the repair of the church, than they have of the repair of bridges and highways ; the compelling

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Result:—the obligation absolute, and may be enforced by the Spiritual Court.

of the performance of the latter obligation belonging exclusively to the temporal Courts, whilst that of the former has been exercised usually, though perhaps not necessarily exclusively, by the spiritual Courts, from time immemorial. It is not impossible that questions may arise, with respect to church-rates, wherein the Common law Courts have not jurisdiction; but, according to Lord C. J. Tindal, the Spiritual Courts have the right, if not exclusively, almost exclusively, of enforcing the obligation to repair churches.

Now from what I have said, the following propositions arise:—First, that the obligation of the parishioners to repair the churches is absolute; secondly, that the performance of such obligation may be compelled; and thirdly, that the performance of it may be properly enforced by the Ecclesiastical Courts, subject, nevertheless, as appears from the judgment in the Braintree case, to the control of the Courts of Common law, when the Ecclesiastical Courts exceed their jurisdiction, or attempt to enforce a rate which is illegal and invalid. The question, then, resolves itself into this narrow compass, namely, whether a rate made under the circumstances already detailed is, or is not, a legal and valid rate? If it is a legal rate, the right of enforcing it and compelling payment is in these Courts; if it is not a legal rate, the Court, if it ventured to enforce it, would be liable to be stopped by prohibition from a Court of Common law.

Then, what is necessary to make a valid church-rate? Nobody can doubt, as was stated by Lord C. J. Tindal, that there is a mode by which a church-rate may be made, against which there could be no objection; namely, by the majority of the parishioners in vestry assembled, after due and legal notice. There is no doubt that such a rate could be enforced by the process of the Ecclesiastical Court, without fear of prohibition. There can be as little doubt (as the Lord Chief Justice says), that a rate made by the churchwardens alone, when the parishioners had been duly summoned, and had refused or neglected to attend, would be a valid rate; for in this, as well as in the case previously suggested, the whole parish would be bound by the acts of the majority present, and the churchwardens would represent

ole of the parishioners. Therefore, in these two
 no doubt whatever could arise. All the books of
 ty and the judgments of the Courts of Queen's Bench
 chequer Chamber, and every day's experience in
 courts, shew that in those two cases there would be no
 y whatever in enforcing the rate. But the question
 is to be done when the parishioners, upon whom the
 obligation to repair the church rests, refuse to make
 —whether the church is to remain in the dilapidated
 which it was when the repairs became necessary (of
 becoming every day more and more dilapidated for
 those repairs); or whether there is any mode by
 he parishioners could be compelled to discharge the
 ive obligation cast on them by the Common law of
 1?

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What is to
 be done when
 parishioners re-
 fuse a rate?

clear that the rate sued for in the former Braintree
 s not a valid rate, because it was made by the church-
 s, not at a vestry duly summoned for the purpose—
 parish meeting of any sort, after notice given to the
 mers,—but at a meeting held three or four days after
 try was dissolved, at which a rate had been refused
 majority. That was an illegal rate, and I should be
 to consider it so. But the present rate was made
 different circumstances. It was a rate made at a ves-
 ting whilst the parishioners were assembled in vestry,
 ie notice, for the purpose of making a church-rate, in
 ice of a Monition, founded on affidavits, and issued
 he seal of the Consistory Court of London, at a time
 ie parishioners present had the opportunity of seeing
 as the rate proposed to be made, the nature of the
 the estimated amount of the expenses, and the mode
 h the rate was proposed to be paid. Now, under
 1 circumstances, it surely appears to be no very great
 of authority to hold that a rate so made was ex-
 different, differing in an important point, from that
 had been considered by the Court of Queen's Bench
 the Exchequer Chamber to be an illegal rate—
 ence which Lord Chief Justice Tindal described as

Distinction
 between this
 and the former
 rate.

MARCH 25. "a wide and substantial difference." In the former rate was made by the churchwardens alone, out of in a secret conclave, where there was no check upon where the parishioners had no opportunity of know amount which was to be collected or the repairs to be made, but where all was done by the church themselves; and though it is true, any parishioner opportunity of objecting to the nature of the rate sum to be levied, and the mode of rating, he could so by adopting legal proceedings at considerable expense instead of having an opportunity of objecting at the rate was made.

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Now, supposing the present rate, made under very different circumstances from the former rate, to be invalid there would be no mode left by which the church could be repaired; it must, therefore, remain unrepaired, increasing every day more and more, and the result necessarily be that the church must become a heap of ruins.

State of the church.

It has made some progress to decay already. In the year 1834, a sum of £35. 4s. was expended on repairs of the church, by the churchwardens themselves, and the parishioners thought the churchwardens should not be losers, and reimbursed them. In 1836, a much larger sum was required, £175, for repairs of the church; and in 1837, a still further sum of £508. 12s. was required for the same purpose, besides £23. 18s. for incidental expenses. In 1841, the estimated amount for repairs was £730. Nothing can speak so strongly as this to shew that the church must have become in a very short period very dilapidated, and this is evident when we consider the nature of the repairs required to be done. All the timber was rotten, the roof required to be repaired, and the walls shored up; and every thing shewed that this church had become entirely dilapidated, and unfit for the purpose of divine worship, unless some mode were adopted to obtain funds to repair it.

Common Law Courts afford no remedy;

Now, where was this fund to be obtained for the purpose of an obligation imposed by law? The Common Law Courts would not interfere by *mandamus*, as appears

use of *Rex v. Churchwardens of Thetford*.* There, an MARCH 25.
 ration was made for a *mandamus* to the defendants to
 a rate for the repairs of the church; but the Court of Veley v. Gosling.
 s Bench said: "We cannot interpose by granting a
amus, this being a subject purely of ecclesiastical juris-
 n." But suppose a *mandamus* were granted to the
 hwardens to call a meeting in order to make a rate, of
 use would it be in this case? There has been no want
 etings in this parish; there is no objection to meet;
 bjection is to make a rate when the parishioners are
 bled—that is, to do that for which they are expressly
 together. Therefore, with respect to the Common
 Courts, there is no mode by which the obligation can
 forced. Then a remedy must be sought in the Eccle- which must be
 al Court. sought here.

w, in what way is it then to be enforced? It has been How to be
 that there are two modes—namely, by placing the enforced?—In-
 : parish under interdict, or by proceeding to excommu- terdict and ex-
 : those parishioners who refuse to contribute their communication.
 rtions to the repair of the church; and that, in former
 , these modes were found to be perfectly efficacious,
 o produce the desired result; and it is true, in those
 , they were efficacious. Lord C. J. Denman observed
 in early times, either of these modes produced the
 d effect, and therefore, that accounts for there being
 imation in early times of a necessity for proceeding to
 extreme measures. But there was great injustice on
 ry face of one of these proceedings—namely, the plac-
 parish under interdict; for the whole parish was
 y punished for the fault of a part—the innocent were
 ended with the guilty. And it was no light matter,
 se times, for a whole parish to be deprived of the op-
 nity of resorting for divine worship to the parish
 h; it was an excommunication of the whole parish,
 ot confined to the offending parties, and it was not an
 matter for persons to resort to neighbouring parish
 hes for the celebration of divine offices—marriages,

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and so forth—because excommunicated persons were cut off from all communion with other parties, and if any person were known to have had communion with an excommunicated person, he was, *ipso facto*, himself excommunicated. And in this case, suppose the process of interdict to be still in existence, and that it could be put in force by this Court, what would be the effect? Why, to punish the innocent alone, for the very persons through whose fault the punishment was called for would be the very persons who, when the interdict was issued, would make it a matter of congratulation, and rejoice that the church was become dilapidated, and that they had succeeded in putting a stop to divine worship there, whilst those who had willingly paid their proportion of the rate would be prevented from attending divine offices in their parish church. Then, what would be the effect of excommunication? In former times, excommunication was an effectual mode; what would it be now? Civil disabilities have been removed from excommunication. The utmost effect of it would now be, that of selecting a few of the most pertinacious opposers of the rate, and proceeding against them. But in a large and populous place, where a great number refuse a rate, the punishment of a few could not have the desired effect, admitting that the process does exist. The effect, therefore, would not lead to the accomplishment of the object sought—namely, the performance of the obligation to repair the church, which is cast upon the parishioners by the law of the land; and, therefore, both modes appear to be inefficacious at this moment.

Inefficacious.

Again, in what mode is the process of excommunication to be put in force? By whom is it to be put in motion, and by whom are the expenses to be defrayed? The proper persons would be the churchwardens, because it is their duty to take care that the church is repaired, and that all the necessities for divine worship are supplied; but are they to do this at their own expense? They cannot be reimbursed for what they expend before a rate is made, and there are no hopes of procuring funds from the parishioners; for the very majority who had been the cause of this mode of proceeding would be sufficient to prevent

making of any rate for that purpose ; therefore, both by
 of interdict and process of excommunication, no re-
 could be obtained.

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question then is, can it be done by any other means,
 those inhabitants who were willing to discharge their
 of the obligation, and who desired to attend divine
 in the parish church, to be content to see their church
 be a heap of ruins, and be compelled to resort to meet-
 houses or other places of worship ? If that be the state
 law, it is one very much to be lamented, and all per-
 competent to conceive the consequences which must
 from such a state of things must be desirous that some
 should be devised by which this singular anomaly in
 law could be obviated.

Is there any
 other mode ?

Now, the churchwardens, in the former case, tried one
 —they made a rate of themselves, after a refusal by
 vestry. That was held to be illegal. They then had
 recourse to another mode—the making of a rate during the
 year of the vestry. Can this be considered a legal mode
 of meeting the difficulties which have arisen out of the state
 of things ? I am perfectly well aware that it has been argued,
 and over again, in the Exchequer Chamber, and in the
 Court of Queen's Bench, and in this Court also, that because
 two ancient modes—interdict and excommunication—
 become inefficacious under a change of times, the Court
 must, therefore, the power to adopt another mode. The
 Ecclesiastical Court cannot make a law for itself to meet
 exigency of the time ; it must be a law sanctioned by
 Parliament, or supported by principle or authority. Now the
 question is, can this rate be supported by law or by autho-

The present
 mode.

Can it be upheld by principle or by reason ? The
 mode to be effected is the repair of the parish church, and
 point upon which alone the parishioners in vestry have
 power to deliberate, is, not whether they will repair or not,
 but upon that they are concluded by the law ; but the
 manner of doing it,—the mode in which the money is to be
 raised and apportioned for that purpose. Is there any thing
 unreasonable in this ? Can it be said that this is the imposi-
 tion of an improper burden upon the parishioners ? It has

MARCH 25. been argued that no tax can be imposed upon any person unless with his own consent, virtual, implied, or expressed. Nobody doubts the general correctness of that proposition; but is this the imposition of a tax? Was it the vote of the vestry which imposed this tax? The tax was imposed already by the Common law of the land. It was an absolute burden attaching itself upon the land, and imposed from time immemorial upon the value of the lands, tenements, and goods of the occupiers in the parish. It is of no consequence whether it attached directly upon the land or upon the person by reason of his being the occupier of the land. The real question is, was this a tax imposed by vote in the vestry? I say, that it is imposed by the Common law of the land, and that every person who occupies land or tenements in the parish, occupies them with the burdens attached to them. Highway-rates and poor-rates are also burdens imposed on the land, or the occupier by reason of the land; and so likewise is the burden of repairing the parish church. It being, then, a tax imposed by the Common law of the land, the only question which could come before the vestry for consideration was, not whether the parishioners would repair the church or not, but how and in what manner the rate should be paid—that is, how they should apportion among themselves the burden imposed upon them by the law of the land, and to which they had virtually yielded their consent by consenting to occupy the land on which the burden was imposed. I cannot consider this a tax imposed by a vote of the vestry; I consider it a tax existing long before vestries were held; and this was a burden from which the parishioners could not relieve themselves; they were not at liberty to enter into the question whether they would repair or not repair their church—the law was conclusive on that point. In fact, I consider this to be a tax existing long before vestries were called upon to act in its application. But when they were assembled together, then their business was to apportion the burden among themselves.

Not a tax imposed by the vestry.

The question has been asked repeatedly, in the course of these discussions, for what purpose the parishioners were called together, if, when they were assembled, they had no

to refuse a church-rate? The churchwardens might
 ell make a rate without calling the parishioners to-
 at all. I consider that, when the parishioners are
 together, it is the business of the churchwardens to lay
 e them (as they did in this case) the particulars of the
 rs proposed to be made, and the estimate of the ex-
 s, and the amount of the rate, and the mode in which
 intended to apportion this burden among the pa-
 nners; and these are the proper subjects which the
 hioners are called upon to discuss. Chief Justice Tin-
 ays that they are not at liberty to consider whether they
 d repair or not, but only the mode in which the fund
 o be raised; and the mode of raising that money was
 rate. Now, making a rate and imposing a tax are very
 ent things. Making a rate is to equalize the propor-
 in which persons should be called upon to contribute
 e whole amount, and that is the real way of making a

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Now, in this case, what did the churchwardens do?
 submitted a rate to the parishioners, and an estimate
 e expenses they proposed to incur. No objection was
 : either to the necessity of the repairs, the extent of the
 ate, or the amount of the rate proposed—2s. in the
 d; the majority only met it by a direct negative, de-
 ng that they would have no rate at all; that they would
 erform their legal obligation; that they would not do
 which the law said they must do, namely, repair the
 ch; and not only did they declare that they would not
 eir duty, but, as a majority, they prevented others,
 inority, from doing theirs; the churchwardens could
 o rate at all, and, by a kind of solecism, they were
 ed to resort to the voluntary system; in point of fact,
 esolution of the majority amounted to a declaration that
 would not repair the church at all. Therefore, it comes
 : considered what is the effect of such a declaration,
 they would not repair their church, which the law says
 shall repair?

ie difficulty in the present case appears to be, to find
 rities upon which the principle of this rate may be
 orted. It is not my intention to travel through the
 Difficulty to
 find authorities
 to support the
 principle of this
 rate.

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vast body of authorities quoted in the Consistory Court, the Court of Queen's Bench, and the Exchequer Chamber. The principle is to be found in the judgments delivered by the Chief Justice of the Common Pleas (sitting in the Exchequer Chamber), who guarded himself by using the terms to which I have already referred. I have stated that no injustice has been done in this case, unless it can be shewn that the rate is illegal, or that the sum is too great, and the parishioners had an opportunity of doing that at the time the rate was proposed and the estimates were brought forward. But no; they would not enter into a consideration of those points; they would have no rate at all. They had a full opportunity of objecting on every legal ground, and, therefore, there can be no injustice unless it can be said that it is unjust that a party should be compelled to do that which he is unwilling to do, though the law says he is bound to do it.

The cases referred to in the arguments on this case are those which go to shew that the churchwardens of themselves could not make a rate binding upon the whole parish, unless under certain circumstances, namely, where the parishioners being duly summoned, neglected or refused to attend. It is admitted by all the writers, that the churchwardens may of themselves make a rate, valid by law and upon principle, where the parishioners have been called upon to assemble in vestry for the purpose of making a rate, and do not attend; it then becomes the duty of the churchwardens to do so, who virtually represent the parish, as the majority of the vestry. These cases shew that a rate so made, which would be made with the consent of the majority of the vestry, is a valid rate; this is certainly true, as a general proposition; though, that a rate made by the churchwardens alone is invalid and illegal, nobody doubts, as a general proposition. But I do not find that it has been laid down, that a rate made by the churchwardens and the minority in vestry assembled, under any circumstances, is an illegal rate. It is true, that by the reasoning of the Judges of the Court of Queen's Bench, the inference would be, that it was the opinion of those four learned Judges, that such a rate would be illegal, for their reasoning went to that extent; but that is no decision upon

it, because the only point before them was, whether made under the circumstances of that case was illegal, the circumstances of that case being very different from the present case. The Court of Exchequer Chamber not adopt the whole of the reasoning of the Court of Bench; because, if it had adopted it, Chief Justice and the other seven Judges would not have guarded themselves as they did against being supposed to affirm this proposition, that no rate could by possibility be made without the consent of a majority of the parishioners. They only guarded themselves against being supposed to affirm a general proposition, and expressly stated (and could hardly have done so unless they had a strong opinion that such a rate as this might be supported) that, they gave no opinion upon the point, yet there was an important distinction, "a wide and substantial difference," between a rate like the present and the rate sued for in that case, and they reserved to themselves the right of forming an opinion upon such a case as this when it should occur.

There have been cited by which this position is supposed to be established. The *dictum* in Bacon* and Degge,† 1 upon a case in Ventris,‡ Trin. T. 1683 (in one called *Thursfield v. Jones*), that, if the parishioners, summoned to make a rate, refuse or neglect, the churchwardens may make a rate of themselves, I am not to dwell upon. In the edition of Degge, subsequent to the case in Ventris, he says "*ideo quære*," as if he had doubted whether he should adhere to the opinion, and it might be carrying the doctrine too far to say that, if the parishioners refuse a rate, the churchwardens alone may make a rate. *Thursfield v. Jones* is said to be no authority; it has been termed a suspicious authority, and an unsatisfactory authority, and it led to no result; for it does not appear whether there was a prohibition or not. Therefore, I am not going to lay any great stress on that, but rely on the authority of Sir Simon Degge on this point.

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* tit. "churchwardens," (c).

Bacon's Counsellor, c. 12, p. 165.

† 1 Ventri. 367.

* L. II.

2 R

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But amongst other authorities cited is the case of *Gaudern v. Selby*, a case which was well considered, and decided by one of the most cautious judges. That case does not appear to me to have met with all the attention which it deserves; I think it has, to a certain extent, been most unjustly calumniated; for a little consideration will remove some of the objections made against that case. It has been said that that case has been repudiated by the Court of Queen's Bench, and undoubtedly it has been so; but I do not think that the case was fairly before the Court of Queen's Bench, so as to enable that Court to form an accurate opinion upon it, for it went before them with all the objections to it unexplained, and the learned Judge of the Consistory Court has declared that he dissents from it, and that, considering its irregularities and anomalies, he holds himself unfettered by it, and at liberty to follow his own notions of the law.

Case of *Gaudern v. Selby.*

Now let us consider what were the circumstances of that case of *Gaudern v. Selby*. The point incidentally decided was that the rate was a good and valid rate; that the churchwardens were entitled to sue for and recover it, and that the Spiritual Court was competent to enforce its payment. The case came before Sir William Wynne in 1799. The suit began in the Consistory Court of Peterborough, in 1795, and the proceedings there, apparently, to a certain extent, were anomalous and irregular. But whatever might have been the faults of the proceedings in the Court below, the Court of Arches was not responsible for the irregularities and anomalies of the suit; the question came before Sir William Wynne upon the merits. There was no appeal in any of the intermediate stages on the ground of these irregularities; nothing of the kind. It came before the Court of Arches on the merits, as to whether the rate was a good and valid rate, and whether it could be enforced in these Courts. The case has been fully stated in the former proceedings.* The Citation was taken out in 1794. The proceedings went on, and proceeded to a final sentence in the Court of Peterborough, the Judge being of opinion that the rate ought to be sustained, and be

* 1 Curt. 391. 1 Notes of Ca. 468.

Jaudern in the rate and expenses. When the
 re upon the merits, no objection was made to
 gs in the Court below, on the ground of irre-
 : the proceedings went on to sentence in the
 except that in the Court of Arches an Allegation
 in, pleading that the rate had not been allowed
 part of the parishioners, for that, on the con-
 te had been disapproved and disallowed by the
 : the parishioners: so that the fact of the rate
 een made by the majority was brought directly
 : of the Court by this Allegation, which was
 · William Scott, and it stated distinctly that the
 made by the major part of the vestry, but had
 oved and disallowed by the majority. There-
 t could not have escaped the attention of the
 e of the Arches Court, it being brought in the
 manner to his notice, for it was objected that
 invalid because it had not been made with the
 e majority of the vestry, and the question was
 at point. It is true that no authorities were
 n the Argument or by the learned Judge in his
 d it is suggested that the Counsel might have
 are for the consideration of such a question as
 cannot be supposed that, in the year 1799,
 ld have been so ignorant of the law in respect
 es, as to have come unprepared to discuss it.
 : case in *Ventris* may have been cited in the
 but that Sir Wm. Wynne could have been igno-
 law in respect to church-rates, or that it was
 t authorities should be cited on the subject, is a
 / thing. It has been supposed that Sir Wm.
 : thought he was deciding this question—that
 e was deciding another point, namely, whether
 d be made without the consent of the majority
 oners. That must be a matter of conjecture.
 at there is a distinction between a rate made in
 : churchwardens and the minority, and a rate
 churchwardens alone out of the vestry, without
 parish. But am I to assume that all these cir-

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cumstances did not have their weight with Sir Wm. Wynne in deciding the case, when it was so distinctly brought to his notice that the rate was made in the vestry by the minority of the parishioners? Why are we to make this case an exception to the general rule, and suppose that Sir Wm. Wynne, in deciding it, had not all the circumstances present to his mind, and did not give them the consideration due to them? I am not at liberty to presume any such thing. Therefore, the case of *Gaudern v. Selby* is not to be impeached upon the grounds stated by the learned Judge of the Consistory Court, or because there were anomalies and irregularities in the proceedings, and therefore it was unworthy of notice. If there were irregularities in that case, they originated not in the Court of Arches, but in the Court below, and no objection was taken on that ground, and Sir Wm. Wynne, sitting in a Court of Appeal, could not dismiss an appeal on the ground of anomalies and irregularities in the Court below. We endeavour, in this Court, as far as we can, to remedy the anomalies and irregularities of the Courts below, in order to prevent the failure of justice. But I doubt, if the party had taken advantage of these irregularities, whether they are such as would have vitiated the proceedings; at all events, I find from a case mentioned in Dr. Andrews' Notes, that a proceeding against a party by two Judges at the same time was not held a sufficient ground for nullifying the proceedings.* Supposing there were irregularities in the case, if explanation had been called for, they might have been satisfactorily accounted for; and, at all events, they are not imputable to the Court of Arches, and should have been objected to before issue joined.

It has been attempted to account for the decision in the case of *Gaudern v. Selby* from the circumstance of the great

* The case was a proceeding against one Mary Townsend, on the 4th session of Hil. Term, 1713, who had been cited before both J. B., the Commissary of the Bishop of Lincoln, and G. N., the Official of the Archdeacon, in a cause of church-rate, and the sentence, condemning the party in the rate and costs, was pronounced by the former in the absence of the latter. This Court held that, as no objection had been taken at the time and before issue joined, it did not prevent the Court from hearing the case on the merits.

re of business in the Court in 1798, when Lord All became Judge of the Court of Admiralty, and when sed to be Counsel for the party appellant. But who his Counsel? Dr. Arnold and Sir John Sewell, neither om was deficient in zeal for his clients, or likely to de- is interests, and they did not fail to take objections and ow the case up to the period of the hearing. Dr. Arnold t that time in great practice; he was excelled by no a knowledge and the learning of these Courts, and if d considered that the case had been wrongly decided, that the rate was illegal, he would have advised his to appeal.

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ider these circumstances, Sir Wm. Wynne could do no than pronounce upon the merits. Let the irregulari- be what they might, they were not brought to the ion of the learned Judge, and they could not detract the weight which attached to his judgment. Sir Wm. e must be presumed to have decided in that case that te was a good, valid, and legal rate, and one which ought enforced. It is true, no authorities were cited by the sel or by him, but he was the last person who could be ed of a disposition to "make law";* of all persons in orld, he was the last to be accused of that; but, having ed himself as to the law, he pronounced that to be the hich he laid down, and I therefore look at this as a de- , direct, positive, and absolute decision upon the very hich the Court has now before it. It is, in my , a precedent for this Court; whether binding upon ourt is another question; whether I am at liberty to t from it,—whether any thing has since been decided e Court of Queen's Bench or in the Exchequer Chamber , has shaken the authority of that case,—I am now to ler. If I am satisfied of the affirmative, I am at liberty art from it; or if I am satisfied in my own mind that ot the law, I am at liberty to avow and act upon that n; but unless I am so satisfied, I have no objection to r myself under the authority of Sir Wm. Wynne, and ress my opinion that the law is as he has laid it down.

A direct de-
 cision upon the
 point.

* *Per Lord Denman, in Burder v. Voley, 253.*

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Now undoubtedly that case was repudiated by the Court of Queen's Bench, as stated by the learned Judge of the Consistory Court, and repudiated in strong terms, with reference to the anomalies and irregularities in that case, and, as cited to that Court as an authority against the position, that churchwardens cannot make a rate of their own sole authority for the repair of the church. The Court of Queen's Bench, it is said, held that the case was of no authority; did the Court of Exchequer Chamber consider the case as of no authority whatever? Those learned Judges did not express themselves so. They said it was no authority for that which was contended for there, namely, that the churchwardens might, of themselves, and at a different time and place, after a rate had been refused, make a rate, by their own authority, over the whole parish; that it was no precedent for that position, for that the case was not the same; but when the learned Judges in the Court of Exchequer Chamber delivered their judgment and restricted that judgment to the new point before them, that the rate sued for was not a legal and valid rate, and when they referred to the case of *Gaudern v. Selby*, what did they do? Why, they adverted to the very point, whether a rate made by the churchwardens and a minority of the parishioners, at the very meeting, assembled by due notice, at which a rate had been refused by the majority, would be a legal rate, and they did not repudiate the case of *Gaudern v. Selby* as an authority for the affirmative of that proposition, but, on the contrary, they took a distinction between that case and the case they were considering, and they expressly stated that there was an important distinction, "a wide and substantial difference," between the two cases; leaving it to be inferred that if they had had to deal with such a case as that of *Gaudern v. Selby*, the result might have been different. They said: "It is unnecessary to discuss this point, as the facts of the present case do not bring it before us; it is sufficient to say, whilst we give no opinion upon it, we desire to be understood as reserving to ourselves the liberty of forming an opinion whenever the case shall occur." Therefore, so far from repudiating the case of *Gaudern v. Selby*, they threw it out for the consideration of the parties, and reserved it to themselves

in an opinion, whether a rate so made would not be a rate. Can I suppose that they would have gone out of way to use such expressions if they did not attach importance to that case? Would they have thrown the distinction to the parties, so as to suggest the pre-course of proceeding? In my humble judgment, they did not, and I think that, if they had not attached some importance to it, they would not have taken such special care and caution to make it understood that they decided the precise point brought before them. It appears to me that the case of *Gaudern v. Selby* met with an attention which it has not received elsewhere, and which, in my opinion, it is entitled to receive.

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This case, as I have said, appears to me to be a direct authority upon the point. The learned Judge in the Court of Exchequer considers it no authority; I consider it an authority of considerable weight. But it is said there is no other case to shew that that decision was acquiesced in, and that the case came upon the profession by surprise; that the Consistory Commissioners were not aware of the case; I do not recollect (I was one of the Commissioners) that the case of *Gaudern v. Selby* was brought to the notice of the Commissioners, nor do I recollect that I had ever heard of the case of *Gaudern v. Selby* at that time. But from the earliest date of my professional experience, I have always understood that the law was as stated in *Gaudern v. Selby*, that it would have been so held though that case had not occurred. My recollection serves me from the earliest time upon this point, and I am aware of the fact, that the opinion of the learned Judge of the Consistory Court the other way, and that, in his opinion, formed from the decisions he had received, the law would not permit a rate so made to be considered a good and valid rate; that he has always been of that opinion from the first, and he has a great force of argument against the validity of such a rate as this.

Now, the Judges in the Exchequer Chamber assimilated the case in some degree to that of voting at the election of an officer in a corporation: "We do not enter into the dis-

Analogy of
election in a
corporation.

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cussion, whether a rate so made by the churchwardens at the parish meeting where the parishioners are met would be valid or not, or how far such case may be analogous to that of the members of a corporation aggregate, who being assembled together for the purpose of choosing an officer of the corporation, the majority protest against, and refuse altogether to proceed to, any election; in which case, they have been held to throw away their votes, and the minority, who have performed their duty by voting, have been held to represent the whole number." Thus, they said they would not enter into a discussion upon this point, but it is clear that they thought the cases in some degree analogous; that is, that, if the majority of the parishioners voted against a rate, they might, perhaps, be held to have thrown away their votes, inasmuch as the only point upon which the parishioners could deliberate, when duly convened to make a rate, is, not whether the church should be repaired or not, but how and in what manner the rate for repairing it shall be made. The church stood in need of repair; the vestry could not enter into a discussion whether the repairs should be made: the necessity of the repairs was apparent, and if the majority refused to vote for a rate, it may be that they threw away their right to vote as much as if, at the election of an officer of a corporation, the majority would not vote, when the minority elected, and the election of the minority is good. Surely, there is no great dissimilarity between the cases, though the one is a case of the exercise of an elective franchise, and the other the making a rate—not a tax, for the tax is imposed by the law. I am of opinion that there is an analogy between the two cases. I will not undertake to say that I perceive a sufficient analogy to hold that there is a perfect coincidence between the cases of persons who will not vote for any rate at all, and persons who refuse to proceed to an election; but there is a strong analogy. These persons say, "We will have nothing to do with the rate; we will not make it; whether the church wants repairing or not, we will have no rate at all;" in the other case, the majority refuse to proceed to an election required by law. Why should not the minority proceed with the churchward-

to make a rate? The others, having satisfied their obligation, may be neuter, or may protest against it. Under these circumstances, I do not think the analogy so remote as it at first appears. In both cases, the parties decline to discharge a duty for which they were assembled together, and therefore the minority is obliged to do it. I do not enter into consideration of votes given for a disqualified candidate, though there is some analogy between that case and the present. If a person will vote for a candidate for whom he has no right to vote, it is just that his vote should be thrown away; and if a person persists in voting in respect of a matter over which he has no right to exercise the power of voting, his vote may with equal justice be considered to be thrown away. I think the analogy sufficiently clear between these two cases.

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So that, on principle, and supported by the authority of *Gaudern v. Selby*, as decided by Sir Wm. Wynne, and which authority I do not find was repudiated by the learned Judges in the Exchequer Chamber, I have a right to say, that at least there is no decision against a rate so made; that it is not decided that such a rate is an illegal rate; for, with the exception of the judgment I am now revising, there has been no decision upon the point. The Court of Queen's Bench has said, that no rate is valid without the consent of a majority; the Court of Exchequer Chamber did not go so far, and merely decided the point whether a rate made by the churchwardens alone, at another time, after the trial, could be sustained—they recognized between that and the present rate "a wide and substantial difference," and so far from repudiating the case of *Gaudern v. Selby*, the Judges in the Exchequer Chamber affirmed the principle to a certain extent.

Without, therefore, entering further into the questions which have been raised upon the judgment of the Court before, which have been very ably argued, and which have shown some difficulties in the way, undoubtedly, of supporting a rate of this kind,—though some of them may be reconcilable with notions of justice and equity, nay, may be very difficult to explain,—still I say that, looking

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at all the circumstances of this case, looking at the authorities and the reason of the thing, and considering that the parishioners are bound by law to repair the church, and that the remedies of excommunication and interdict will not effect that object; that the present mode of proceeding is simple and just, and that the parties had all the opportunities they would have by any other course, of considering the necessity of the repairs, the amount of the expense, and the estimates and equality of the assessment, it does appear to me that reason supports the principle to be extracted from the case of *Gaudern v. Selby*. As to the *dictum* in *Thursfield v. Jones*, the Court has not thought itself at liberty to proceed upon that as an authority.

Liability of
churchwardens.

A great deal has been said, with reference to the last-mentioned case, as to the churchwardens being the persons to be punished if the church is not repaired—not except they are cited, and they are the persons to be cited. We are indebted to Archdeacon Hale for a publication, in 1841, entitled *Precedents in Causes of Office against Churchwardens*. This work teems with precedents of proceedings against churchwardens. In every case the churchwardens were the parties cited to shew why they had not called the parishioners together to make a rate; and in one instance, in 1601, the Court directed them, if the parishioners would not concur, to make a rate themselves.* The churchwardens were the persons to be cited, yet they were not to be punished if they had not funds for the repairs. They were, however, the parties to be cited, as primarily liable, and they must excuse themselves as well as they could. In many of the cases, the churchwardens were monished to do certain acts when they alleged their inability, stating that the parishioners were unable by reason of their poverty. True it is, that in the book it appears that various modes were adopted of

* P. 98. In the Court of the Archdeacon of Essex. The Monition directed the churchwardens to give warning publicly in the church to the inhabitants to meet and make a rate for the repair of the church, and "if the inhabitants of the said parish will not join with the said churchwardens, &c., that then the said churchwardens shall themselves make a rate for the levying of the said charges, &c."

repairs, which were illegal ; commissions were making rates, but they were decided to be illegal, tedly they were so ; but Monitions were issued ardens, who appeared and stated that they had y could, and that the parishioners would not do and that the church was in a dilapidated state ; the parishioners were cited to shew cause why a ould not issue, and as no appearance was given, at there was no ground for objection.

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then, entering further into the present case, it ie, that both law and the justice of the case re- I should reverse the judgment of the Court opinion is, that the law, as stated by Sir Wm. he law and justice of this case, and that to reject ould be to do that which, in my opinion, is con- and justice. I know the difficulties which I may unter hereafter to support this judgment. It is his case, as in the former case, a prohibition ed for, and be issued by the Court of Queen's that the case may afterwards be carried by writ the Exchequer Chamber. It is possible that the re Exchequer Chamber may come to a decision not law which is stated as law by the Court as by Sir Wm. Wynne in 1799. It is possible be the result of the present decision ; but I it to anticipate that such will be the result, when judges of the Exchequer Chamber reserving to he liberty of forming an opinion upon this very ver such a case should come before them. Or, : that this case may go up by appeal to the Judi- tee, who would, of course, consider the case ce to the arguments adduced before them, and oubt that justice will be obtained. If this case efore that Committee, the whole question would est. At present, it is clear the judgments of ' Queen's Bench and of the Exchequer Chamber ecided that the churchwardens cannot make a selves out of vestry, when the rate has been re- majority of the vestry ; but the question has not

MARCH 25. yet been decided that they cannot make a rate in vestry
under the circumstances in which this rate was made.
Veleyv. Gosling. Should that point be also decided in the negative, then the
whole question will be set at rest, and it will become a matter
for consideration whether the Legislature ought not to take
some steps to meet the case, in order that a remedy for an
admitted evil may be provided.

Judgment of Court below re-versed. I am of opinion, that the judgment of the Court below
was erroneous, and I am therefore under the necessity of
pronouncing for the appeal, reversing that judgment, and
retaining the principal cause.

Libel admitted. (The Libel was admitted—the question of costs being re-
served.)

Proctors: — *Iggulden*, for the Appellants; *Pritchard*, for the Re-
spondent.

END OF HILARY TERM, AND OF THE SITTINGS
AFTER TERM.

EASTER TERM, 1843.

High Court of Admiralty.

APRIL 28.

THE "ANN AND JANE."—*Motion*.—This was a cause
 image by collision, in which the owner of a French
 sued an English schooner. The collision took place
 Lamborough Head, on the morning of the 18th April,
 The party proceeding brought in his Act on Peti-
 to which an Answer was given, and a Rejoinder fol-
 lowed; but an objection was taken to the Rejoinder, by the
 proceeded against, who alleged that the facts stated
 in were either a repetition, or such as should have
 stated in the first instance, in the original Act.
Dams, D., and Robinson, D., in support of the objec-
Harding, D., and R. Phillimore, D., supported the
 tion.

MR. LUSHINGTON.—With regard to the regularity of the
 tion, it is perfectly true that such a motion is not
 ly made in these Courts; but it is equally true that it
 rectly competent to the party to raise such an objec-

That point was solemnly decided by Lord Stowell, in
 case of the "*Ville de Varsovie*."* In that case, the
 tion went not to the whole of the Act on Petition, but
 to a part, and it was urged that the objection was en-
 a novel proceeding; but Lord Stowell overruled it,
 determined that he was bound to consider whether the
 tion was well founded; and, on a perusal of the papers,

* 2 Dods. 174.

APRIL 28. he thought it was well founded, and he directed the objectionable parts to be expunged. At the same time, although it is competent to a party to raise the objection, it would be exceedingly inconvenient if it were raised upon ordinary occasions, or on slight grounds, because it would lead to delay and to increased expense. The question which I have now to determine is, whether, on a consideration of these papers, the objection is so weighty and important as to call upon the Court to reject the whole of the Rejoinder, or any, and if any, what part of it.

Ann and Jane.

It is clear that it is most desirable, in all these cases, that all that ought to be stated on behalf of the party complaining should be stated in the first instance, and that nothing can be more inconvenient than the bringing forward a case in detached parts. Whatever comes in the nature of a Reply, ought to come in the nature of a contradiction of what is offered in the way of defence, and as explanatory of the grounds on which such contradiction is given. It will frequently happen that great difficulty will arise in attempting very minutely to examine and decide what is strictly in the nature of a Reply, and what ought to have been stated in the first instance.

With regard to the present Rejoinder, I certainly am of opinion that, in strictness, there are many facts stated in it which ought, if stated at all, to have been in the original Act on Petition. Indeed, it is not denied by Counsel that one fact, which is stated here somewhat minutely, ought to have been set forth at an earlier period, if they had received the information. I have alluded to the tendency which this has to produce delay in many cases, and it is exceedingly inconvenient that a Reply should set forth circumstances which ought to have formed part of the primary proceedings, and I accede to the observation of Dr. Addams, that this is not of the nature of a Reply, inasmuch as there are no statements to be found in the Answer to the Act on Petition which called for them. With regard to other facts, it does appear to me that they savour of repetition; at the same time, there are other parts of the pleadings to which no objection is taken; and the question for me to

mine, therefore, is, not whether I ought to reject the
e of this Rejoinder (for that I cannot do), but whether
ht to direct it to be reformed, by striking out those
which ought to have formed part of the original Act,
hose parts which are wholly irrelevant.

APRIL 28.

Ann and June.

ow, in a case of a proceeding by a British owner, I
d be inclined to view an objection of this kind with
favour; yet, at the same time, I am of opinion that
an objection ought not to be raised but on grave or
iar grounds, otherwise it would become the practice
ject to Acts on Petition as to Allegations. But with
d to a British owner, I should hold him more strictly
d to set forth his whole case in the first instance, than a
mer, because he is more competent to form an opinion
at ought to be done, and has better means of acquir-
nformation. But with regard to a foreigner, I think
entitled to greater indulgence, and it is upon that
d that I rest my decision.

oking at the whole of the Rejoinder—thinking, as I
said, that there are some parts which are not strictly
int, some parts respecting which I am not competent
m a decided opinion at the present moment, and some
which certainly ought to have formed a part of the
ial pleadings; considering, however, that it is the
of a foreigner, I think that, upon the whole, I shall
ore likely to attain final justice by not directing the
nation of the Rejoinder. Of course, if more expense
urred, and it should turn out that the foreigner has
a complaint which he is not able to substantiate, the
used costs will fall upon him.

Objection
overruled.

t the hearing of the cause, in Trinity Term, the July 13.
; assisted by Trinity Masters, pronounced for the da-
, holding the English schooner solely to blame.)

ctors:—*Buckton*, for the English owner; *Glennie*, for the
h owner, the party proceeding.

MAY 5.

A warrant of arrest, to prevent the vessel from being taken out of the country, refused on the application of a mortgagee.

THE "HIGHLANDER."—*Motion*.—This was an application on behalf of the mortgagee of a moiety of the vessel (with power of sale) for a warrant of arrest to prevent the vessel, which was about to sail, from being taken out of the country without his consent.

Addams, D., supported the application.

JUDGMENT.

DR. LUSHINGTON.—I am not aware of any case in which such an application has been granted. The Statute does not enlarge the jurisdiction of the Court in this respect, and I doubt whether I could grant a warrant of arrest on the application of a mortgagee. But I will consider the point and let the Registrar know.

Motion rejected.

(The motion was rejected.)

Nelson, Proctor.

Prerogative Court of Canterbury.

MAY 15.

A will of 1823, executed by a mark, the drawer and attesting witness being dead, admitted to probate on proof of the death and handwriting of the attesting witness.

IN THE GOODS OF ANN FASSNIDGE, WIDOW, deceased.—*Motion, ex-parte*.—The deceased died 20th March, 1834, without child, parent, brother, or sister, leaving a will, dated 25th November, 1823. At this time, she was living as housekeeper with a miller, and was confined to her room in his house by illness. The will was executed with a mark, and underneath the mark (described as that of the deceased) appeared "witness, Mary Giles," in whose handwriting the will was believed to be. The attestation-clause purported that the will was "signed, sealed, published, and declared by the said A. F., the testator, as and for her last will and testament, in the presence of us, who, in her presence and in the presence of each other, have set our names as witnesses hereto. T. P. T. G." It appeared, however, that T. G., one of the subscribed witnesses, received the will

the deceased, and took it to T. P., the other subscribed
 ess, who stated that T. G. requested him to put his
 e thereto, which he did, as did T. G.; but they did
 see the deceased make her mark to the will, or in any
 acknowledge the same. Mary Giles, the writer of the
 and whose name appears under the deceased's mark,
 many years ago, and T. G., the subscribed witness,
 in April, 1842. The property was small, consisting
 ipally of a legacy of £50 bequeathed to the deceased
 relation in 1802, payable on the death of his widow,
 h occurred in March, 1842.

MAY 15.

Fassnidge, dec.

. *Phillimore*, D., moved for probate to the executor. MOTION.

R H. JENNER FUST.—On what proof? The will is **DECREED**.
 ved to be in the handwriting of Mary Giles; but she
 ad. The surviving attesting witness states that neither
 or his co-witness saw the deceased sign the will or ac-
 vledge the signature: so that there is no evidence that
 deceased had any thing to do with it. Mary Giles may
 : been a person of good fame, credit, and character, but
 ve no proof of the character and reputation of Mary
 s, or of her handwriting, or even of her death. There
 t be some inquiry made, as to whether this is her hand-
 ing or not.

Subsequently, an affidavit was produced from Susan Giles, May 30.
 daughter of Mary Giles, setting forth her death, and that
 informed the deponent that she had, at the request of
 deceased, made her will, and witnessed the same, and that
 . and T. P. had also witnessed it: the deponent also
 ed the handwriting of Mary Giles. The Court thought **Probate de-**
 affidavit sufficient, under the circumstances, and decreed **creed.**
 ate.)

swell, Proctor.

MAY 19.

Construction of § 11 of the Will Act.—A major-general in the army, on full pay, and holding the appointment of Director-General of the Royal Artillery, resident at Woolwich, held not to be “a soldier in actual military service.”—What is “actual military service.”

DRUMMOND v. PARISH.—*Allegation.*—This was an Allegation propounding, by direction of the Court, a testamentary paper, bearing date the 16th of June, 1842, in the handwriting and signed by the late Major-General Percy Drummond, Director-General of the Royal Artillery at Woolwich, who died the 1st of January, 1843, leaving a widow, appointed sole executrix and universal legatee, and a sister, Mrs. Parish, also a widow, and leaving personal property of the value of £4,700. The paper (which was found locked up in his private repository) was not attested, and would, therefore, be invalid under the Will Act, unless the deceased came within the exception contained in the 11th section, which provides “that any soldier, being in actual military service, may dispose of his personal estate as he might have done before the making of this Act”—i.e. without any solemnities, or even by parol. The question was whether the deceased was “a soldier in actual military service.” The Allegation pleaded that, at the time of his death, he was a major-general on full pay; that he held the appointment of Director-General of the Royal Artillery, and received the full pay and allowances of such appointment; that the duties of his office extended to the troops of the Royal Artillery abroad as well as in England; and by reason thereof he was subject in all respects to martial law, and was liable to be tried by court-martial, to be sent abroad and called into foreign service whenever an occasion might require, and was as completely at the disposal of her Majesty, to all intents and purposes, as if he had been in the actual command of a regiment on foreign service, and therefore a soldier in actual military service.

Feb. 22.
ARGUMENT.

Sir John Dodson, Q. A., for Mrs. Parish, against the admission of the Allegation.—The deceased is not included in the exception, within the true intent and meaning of the Act. The object of the Legislature was to provide one uniform mode of executing wills, in order to exclude doubt and prevent frauds. The reason of the exceptions is, that persons in actual military service, as well as at sea, are not

ys in a situation to obtain advice, or the means of executing regular wills. A naval officer or seaman on board a man's ship in Portsmouth harbour would be as much in actual service as General Drummond was, and would be fully liable to be tried by court-martial; but he would be within the exception, not being "at sea." The words "actual military service" must mean a service in which some kind of action is going forward. General Drummond resided at Woolwich. If he comes within the exception it will include every officer and soldier on full pay in Majesty's dominions, including the militia, and if this has been the intention of the Legislature, they would have employed the words, "any soldier in her Majesty's service." The origin of the exemption is to be found in the Roman Civil Law, where it applied only to soldiers on an actual military expedition, and not to those at home. The *Inst.** The *Code*.† The *Institutes*.‡ Domat, *Lois Civ.*§ d, *Institutes of Civil Law*.|| Harris's *Justinian*.¶ Gohin, *Orph. Leg.***

Miss, D., on the same side.—Swinburne†† confines the privilege of making military testaments to the *milites armati* or such as are "in expedition or actual service of the king." This shews the expressions to be synonymous, and "*in expeditione*" is properly translated "in actual military service." Then what is the sense of *expeditio*? *Erst*‡‡ says:—"Ratio indulti militibus privilegii redditur Justiniano 'propter nimiam imperitiam eorum,' quæ tamen non est color, quam solida ratio videtur. Quippe secundum milites quoque in ædibus, vel in sedibus, i.e. præsedibus atque hybernis, idem privilegium obtinerent, quoniam ibi non peritiores sunt, quod tamen negatur.....ubi locus privilegium duntaxat est in expeditionum necessitate; extra quam non est observatione juris communis obstricti sunt, ut pagani."

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Lib. 29, tit. i.

Lib. 2, tit. xi.

B. 2, ch. 4, p. 179.

P. 1, ch. 5, p. 16.

Præf. Jur. Civ., lib. 2, tit. xi.

† Lib. 3, tit. xxi.; lib. 6, tit. 17.

§ 2 tom. liv. 3, § 15.

¶ *In loc.*

†† P. 1, § 14.

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J. Voet* says:—"Testamentum militare est, quod militis non domi factum ab eo, qui in numerum relatus stipendii meret; occasione quidem imperitiæ juris inductum, sed tem præcipue propter honorem militiæ, et pericula tempore expeditionis imminencia, quæ non patiuntur milites exactæ solennitatum civilium observationi intentos esse.....Unde et illi temporibus, per quæ citra expeditionum necessitatem in locis vel in suis ædibus degunt, minime ad vindicandum tale privilegium admittuntur." P. Voet:†—"Testamentum sequitur militare, quod militiæ factum est a milite, vel ab eo qui loco militis censetur. Dico militiæ non domi, non in hybernis, quod nisi in castris et expeditione factum sit, militare testamentum non dicatur." Mynsinger:‡—"Videtur Justinianus hic velle, quod causa militaris privilegii circa testamentum sit ipsorum imperitia, quia potius arma et militaris disciplinam, quam leges scire teneantur. Sed hæc non finalis causa hujus privilegii.....Quare Decius ob publicam utilitatem, qua se morti exponunt, tributum id militibus prodidit, quod et præsens textus satis evincit his verbis, 'cum in expeditionibus occupati sunt'.....Cum enim istius privilegii ratio supra tradita (nempe occupatio bellica) tum cesset, tum ipsum privilegium cessare consentaneum est." Durandus:§—"Milites dum sunt in castris seu in expeditione testari valent prout volunt, etiam sine duobus testibus.....sed quando sunt in propria vel aliena domo, testari debent jure communi." Hostiensis:||—"Talis miles privilegium habet, quia si in expeditione est, in conflictu belli vel vitæ periculo constitutus, licet ei testari quomodo potest et vult.....Quod si non in expeditione, sed si domi sit vel alibi, jure communi testari debet." Gaill:¶—"Nam licet milites nostri temporis, quoad solennitates testamentorum, ut dictum est, juris prerogativa habeant, tamen illud privilegium certis finibus circumscriptum est, et non semper neque ubique militibus competit:

* Comment. ad Pandect., lib. 29, tit. i.

† Ad Just. Inst., lib. 2, tit. xi.

‡ Ad Inst., lib. 2, tit. xi.

§ Speculum Juris, lib. ii., pt. 2.

|| Summa Aurea, lib. iii., tit. xxvi.

¶ Lib. 2, obs. 118.

*ne demum quando sunt in expeditionis necessitate
perimine belli: extra vero necessitatem expeditionis,
solemnitates testamentorum jure communi uti de-*

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The Roman writers made a distinction between *testamentum militis* and the *testamentum militare*; and every soldier's will was a military testament. *Ulpian** says: "*Hoc privilegium testandi, non semper tribuitur, sed militibus in expeditione occupatis, institutione Justiniani effectum est.*" *Viglius*:† "*Properatorum providentia citra expeditionum necessitatem in sacramento astricti milites coeperunt ... atque adeo ut Justinianus, ut interea, dum quiescunt, militiæ privi-* ob juris ignorantiam concessis non fruuntur, cum de suis cogitandi satis otii habebant. *Crediderim tamen iani constitutionem tantum intelligendam cum in suis* sive hybernis degunt, i. e. cum bellum non geritur, *prociectu esse milites coguntur, hoc enim significat ex-*" *Puffendorf*:‡ "*Quod miles in otio degens urbe et* bus continetur, *copiam jurisconsultorum habet, quos* us adeat, *militaribus laboribus et occupationibus non* tur. *Aliter in eo dicendum est, qui in iter se jam con-* el jam expeditus ad iter se accinxit, *cujus ex eo tempore* ellicis tantum negotiis occupatur, *adeo ut oblitus quoque* rientia omnis si quam antea habuerit, *videatur.*" This office to shew the meaning attached to the word *dutio*," or "actual military service." Mr. Burge § that the privilege is confined to soldiers "in actual y service," and goes on: "If they are in camp, this ge is enjoyed by them; but at any other time, or they are not engaged in or subject to the urgent of their service, and are not living in the camp, they nake their testaments as other persons." I now pro- o shew how the law stands at present in Europe. By *de Civile* || of France, which is almost *totidem verbis*

* *Ad Cod.* 6, tit. xxi.

† *Inst. Jur. Civ.*, tit. x.

‡ *Obs. Jur. Universi*, obs. 187, § 3.

§ *Comment. on Cöl. and For. Law*, 4 vol. 394.

|| *Lib.* 3, tit. ii. § 2.

citadelle et autres lieux dont les portes seront fermées communications interrompues à cause de la guerre."

Civil Code of Sardinia† and the Code of the king the Two Sicilies‡ the same limitations of the privilege of military testaments are laid down. In fact, the law of France follows strictly the *Code Napoleon*. By the law of 1804 the testaments of soldiers only who are in actual (*en guerra actual*) do not require the solemnity which is required for other testaments. This question is not of modern origin. In 1512, the Emperor Maximilian I., in the *Notarius* issued at the Diet of Cologne, ordered that the term *expeditio* should be confined to "*in acie seu conflictu constituti*." The *Corpus Juris* *Fris* thus declares the law of Prussia: "that the privilege of military testaments should be limited to soldiers in the presence of battle, in a besieged town, on a march, in a frontier position, and when wounded or sick." In Mecklenburg and Westphalia the law is much the same with that of France. In Bavaria it follows strictly the ordinance of Maximilian. In Holland it observes the rules of the civil law.

Haggard, D., in support of the Allegation.—Though foreign codes may be referred to in illustration of argument, they will not govern this Court in the interpretation of a British statute. There has been no attempt to establish an analogy between the Roman army and the British. The law of Rome in respect to privilege

1 *Constitutio introduxit.*" The privilege of making a
 7 testament was confined by him to those who were
veditionibus occupati." Vinnius, on the *Institutes*, a
 f authority on the Roman law, says that the word
'titio' is one respecting which commentators differ.
 is, in his 49th Consultation, "*De Militari Testa-*
 says, "*etiamsi non fiat in procinctu testamentum*
jure militari modo fiat in expeditione, in castris, in
 " He, therefore, rejects the restricted construction,

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ends the privilege to soldiers in camp and in garrison.
 e question must be argued with reference to the
 tate of the British army, and the distinction is be-
 officers on full pay and officers on half-pay, which is
 , clear, and definite distinction, recognized through-
 service. When an officer is on full pay, whether
 in garrison, or at home, he is in actual military
 . The deceased was subject to all the penalties of
 h soldier; he ought, therefore, to have enjoyed all
 vileges. He was in garrison at Woolwich, and
 not be absent from his post without leave. The
 ere closed, and if he had been taken ill in the night
 d not have had professional aid in making his will.
 authorities referred to:—*Re Phipps.* Re Hayes.†*
l v. Morrell.‡ Re Ley.§ Re Donaldson.||]

t, D., on the same side.—An officer has been held
 i actual service, and employed, if on full pay, and
 to military discipline. McArthur, *On Courts-Mar-*
*Bowler v. Owen.** Bradley v. Arthur.††*

CURIAM.—I must take time to consider this case: it *PER CUB.*
 st important question.

H. JENNER FUST.—This paper is all in the hand- May 19.
 of the deceased; it is signed by him and sealed, *JUDGMENT.*
 t attested; so that, under the general provisions of
 ict. c. 26, it is not entitled to probate: I say "under

2 Curt. 368.

1 Hagg. E. R. 51.

Ibid. 386.

* 6 Dowl. & Ry. 421. Barnes, 432.

† *Ibid.* 338.

§ 2 Curt. 75.

¶ P. 190 *et seq.*

†† 4 B. & C. 308.

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the general provisions" of the Act, because it is contended that the paper contains a good and valid disposition of property, as coming within the exception of the 11th section, which, it has been argued, extends to soldiers of all degrees and under all circumstances, unless there may be a distinction between officers on full and those on half pay; otherwise, all persons belonging to the British army are to be considered as being on actual military service.

Effect of the
 construction
 contended for.

Assuming this to be the construction of the Statute, the effect would be to give a power of disposing of his personal property to every soldier on full pay, from the recruit of to-day to the oldest general in the service, not only by a writing unattested by witnesses, but by a will made by word of mouth. The exceptive clause in the present Will Act is the same as that in the Statute of Frauds, which first required that all wills of personal property should be in writing, and, therefore, this construction would give to all soldiers on full pay the power of disposing of property in any manner, by word of mouth or by the most informal will. This is a most startling proposition—that it should be intended by the Legislature to except from the operation of the present Will Act so large a body of persons as the British army consists of.

It must be remembered that, as the exception was made at the time when the Statute of Frauds passed (1676), it must be considered with reference to the circumstances of that time, for the 11th section of the present Act is only a continuation of the privilege granted to soldiers and mariners in the time of Charles 2, and that, before the Statute of Frauds, a will might not only be made by word of mouth, but the most solemn will might be revoked by word of mouth: a will executed in the presence of witnesses might be revoked by parol. What would be the state in which the whole British army would be placed, if the exception contained in this clause were to have universal operation in that body? In the present case, the will is one which the Court would be most anxious to support, if it can: it is holograph, and therefore not liable to the risk of being forged, as if it were a will in which only the sig-

e were in the deceased's handwriting; it is written great care; it was kept by the deceased in his private itory; there is no question that it is his act—the question is, whether it is a will to which the law can effect. But if this holograph paper, unattested, can pported, the decision of the Court must include less d papers, and wills by parol, for it is only by shewing he exception extends to all classes of the army, and to scriptions of testamentary disposition, that this paper e supported. I much doubt whether, if this privilege be maintained, it would be for the benefit of the army ge; it would expose them to all the mischiefs against the Statute of Frauds and the present Will Act were ded to guard, if the Court were to hold that every soldier ll or half pay might make a will by parol, or in writing out witnesses. The Court must, therefore, look into principles intended to be adopted into this Act, as well o the Statute of Frauds.

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e words of the 11th section are: "Any soldier being tual military service, or any mariner or seaman being i, may dispose of his personal estate as he might have e before the making of this Act." These words, "in l military service," must have some meaning; they t have been added to the word "soldier" unless it intended to impose some limitation as to the particu- ass of soldiers they applied to, otherwise it would be ient to have said "any soldier in her Majesty's ser- ' If the exception was intended to comprise all classes all grades of persons in the service, the words "in l military service" are superfluous. The Court must, fore, endeavour to find some meaning for these words e clause, and some reason for inserting them in the two tes.

Meaning of
the words "in
actual military
service."

the elaborate arguments which have been addressed to ourt, it was not referred to any case where this ques- has received a judicial decision, and, with the excep- of a case to which I will presently advert, I am not e of any decision on the point in respect to the will of dier. There have been decisions on the correspond-
L. II. 2 x

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ing part of the clause, as to the wills of mariners at sea, and one case of this description was cited in the Argument—that of *Lord Hugh Seymour*.* One or two other cases of that kind have occurred; but, with the exception of the case I shall refer to, I am not aware that there have been any decisions on this part of the section, except on motion, where the Court has granted probate of a will on a certificate from the War Office; and it has now become a matter of great importance to determine whether persons in the military service are, under all circumstances, entitled to come within the exception contained in the 11th section.

It certainly is, and ought to be, a matter of some surprise, that so few cases should have occurred since the Statute of Frauds, in which it was necessary to consider the effect of this exception; but I think the circumstance is accounted for by the general feeling that it is unsafe to trust to wills made by word of mouth, when the mode of disposing of personal property prescribed by the law was so simple and required so few solemnities, and when the making of a will by word of mouth afforded such opportunities for fraud and imposition, as well as misapprehension, and the paucity of cases may, I think, be fairly accounted for by this circumstance.

Origin of the
 exception.

Now, in the absence of all authority as to the construction of these words, how is their proper interpretation to be ascertained? It was observed in the Argument, and as a general observation it is true, that, in construing a British Act of Parliament, very little light can be gained by referring to other codes of law, and I assent to this, as a general observation. But there are and must be cases in our Courts of law, in which the principle or doctrine of a particular clause appears of doubtful interpretation, and the wording of the Act and the context do not appear in exact harmony, wherein foreign codes or systems of law must be resorted to. In this case, the section in question was borrowed from the Civil Law; this fact cannot be denied; it is admitted on all hands, and the Court has been referred (by Dr. Twiss) to the Life of Sir Leoline Jenkins, who claimed

* *Euston (Earl of) v. Seymour (Lord H.)*, 2 Curt. 339.

the merit for having, in the preparation of the Statute of Wills, obtained for the soldiers of the English army and mariners of our navy the full benefit of the testamentary privileges of the Roman Law, and an exemption from the necessity of executing a will in writing. Now, that exemp-

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having been avowedly borrowed from the Civil Law, in order to shew the manner in which it should be applied, From the Civil Law.

the extent to which the exception should operate, I look to that code may be fairly resorted to, in order to see whether it was the intention of the Legislature, in the Stat. 29 Geo. 2, c. 3, and Stat. 1 Vict. c. 26, to adopt the same exception with some limitation as to the persons whom it was to include. It becomes necessary, therefore, to refer to the Civil Law, and the Court has been referred in the Argument, not only to the text of the Code, but to Commentators on the text, and it is well known that very nice and subtle distinctions are made by those learned writers. I shall not enter into a long disquisition on the different points which the Commentators have treated of in their expositions of the Law; yet I have looked into a great many of their Comments, in order to see to what extent they considered the Law dispensed with, in respect to the *testamentum militis*; and, as far as I can collect from the Commentators, the only difference is, whether the privilege extended to soldiers in quarters or in garrison, *in stativis aut in hybernis*, as well as elsewhere; but all agree, as far as appears, on this point—namely, that it was not every soldier who was included, under all circumstances, to this privilege; but that it was confined to those who were *expeditionibus occupati*, the only difference which prevailed amongst the Commentators seems to be, whether a soldier was to be considered *in expeditione* when in garrison or winter quarters, or whether the *expedition* was then at an end; all agree that he must be *in expeditione*. In its origin, the testamentary privilege extended to all soldiers; we have it positively so expressed in the book of the *Digest*, tit. “*De Testamento Militis*,” and under the head “*De Origine Privilegii Militis*,”* wherein

* *Dig. lib. xxix. tit. 1, l.*

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it is stated (by Ulpian) that the first full and free power of making a will was granted to soldiers by Julius Cæsar. "*Militibus liberam testamenti factionem primus quidem Julius Cæsar concessit.*" This was the origin, according to many of the Commentators, of the privilege of a soldier to make a will free from the necessity of having a certain number of witnesses to attest it, and other solemnities. The text goes on:—"Sed ea concessio temporalis erat. Postquam primus Divus Titus dedit; post hoc, Domitianus Divus Nerva plenissimam indulgentiam in milites et eamque et Trajanus secutus est; et exinde mandatum cæpit caput tale:" and it quotes the chapter "*De testamento Militis*," to shew how very general the provision was in its origin, and it continued so for some time after: the text is to this effect:—"Cum in notitiam meam prolatum inde testamenta a commilitonibus relicta proferri quæ in controversiam deduci, si ad diligentiam legum revocantur observantiam: secutus animi mei integritudinem erga fidelissimosque commilitones, simplicitati eorum consistere existimavi; ut quoquomodo testati fuissent, rata esset voluntas. Faciant igitur testamenta quomodo volunt; quomodo poterint; sufficiatque ad bonorum suorum dispositionem faciendam nuda voluntas testatoris." Nothing, therefore, can be clearer than that the privilege given to soldiers to make a will in any form extended to all ranks in the Roman Empire at this time. The interpretation which the glosses give to the word "*simplicitas*" is "a want of knowledge," a term used by Justinian, in the *Institutes*,* being "*in ignorantia*." The gloss on the words "*nuda voluntas*" is "*nisi dicitur tunc enim jure communi testari debet.*" Therefore, according to the gloss on the text, there was an exception to the general law confining the privilege to soldiers not at home, who were bound to conform to the general law. So the law at the time of the *Digest*. Various limitations afterwards imposed. In the 6th book of the *Code*, "*Testamento Militis*," is a passage which has no bearing on the point the Court is now discussing

* "*Propter nimiam imperitiam eorum.*" Lib. ii. tit. 11,

† *Codic.*, tit. 21, III.

or the sake of the gloss:—"Quamquam militum
 a juris vinculis non subjiciantur, cum propter
 tem militarem,"—the note in the gloss here is:—
 'militiæ,' as if in contradistinction to "togatæ."

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goes on: "quomodo velint, et quomodo possint, ea
 concedatur: tamen in Valeriani quondam centurionis
 o instituto etiam jure communi accepit auctoritatem."

17th law of the same title, headed, "Quando miles
 uomodo vult," is as follows: "Ne quidam putarent
 tempore licere militibus testamenta quoquomodo vo-
 mponere; sancimus his solis qui in expeditionibus
 sunt memoratum indulgeri circa ultimas voluntates
 as beneficium." The gloss on "expeditionibus

is in these words: "Idque sive sint in castris,
 ssato, sive in hybernis, sive in præsiidiis, sive in sta-
 sedibus sedetis ac ædibus." That is the gloss on the
 expeditionibus occupati." And it goes on: "suffi-
 t fiat in expeditione, licet non in procinctu; alio-

aut parum distabit miles a pagano:" and refer-
 nade to the 49th Consultation of Cujacius, which
 in the Argument, and it appears from his Comment,
 cius was of opinion that the privilege extended
 s who were in castris and in stativis. He says: *
 autem quæritur, an non aliter valeat testamentum
 ari quam si fiat in procinctu; respondeo, etiamsi
 n procinctu testamentum valere jure militari, modo
 editione, in castris, in stativis: "so that it was not
 able that the testament should be made in expedi-
 it might be made in castris and in stativis. He adds:
 nihil distaret paganus a milite; nam et a pagano in
 in acie, in hostico quoquomodo factum testamentum

Now, according to this opinion, a soldier in camp
 ter quarters might make a will without observing
 nities of the law; "modo fiat in expeditione, in
 stativis," according to Cujacius; but whether the
 extended to soldiers in castris and in stativis is
 of doubt amongst commentators. I do not, how-

* Consult. xlix. Op. t. 1, 699. Ed. Par. 1658.

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ever consider that General Drummond was *in castris* or *in stativis*; the question is, whether he was *in expeditione*. Cujacius goes on: "*Ergo, qui in expeditione testatur miles, in castris, in fossato, ut loquuntur, imo et qui in hybernis, ut meum judicium est, in stativis, in præidiis, jure militari, testamentum facere potest. Ac proinde non est necesse ut adhibeat legitimum numerum testium, ut est in principio tituli 'De Militari Testamento,' in Institut., ubi et unus testem sufficere Theophilus noster scripsit. Et equidem nullum testem necessario requiro, ac satis esse opinor si alii probationibus legitimis constare possit de voluntate militis.*" Therefore, a soldier, in those circumstances, might make a will without the solemnities of the law, but he must be *in expeditione*; otherwise, in his opinion, the will would not be good. The question, therefore, again arises, what was the "*expeditio*?" Calvin (Kahl), in his *Lexicon Juridicum*,* thus explains the word: "*proprie, profectio cum expeditis militibus*;" and the term "*expediti milites*" he defines: "*vel in expeditionibus existentes dicuntur, quicumque sunt in ipso exercitu aut castris, id est, eo loco quo Reipublicæ causa est belli apparatus, seu in statione illi sunt, seu in hybernis, seu aliubi, pro finibus imperii tuendis: imo quocunque in loco sit militiæ causa, ut si Romæ sint ad defensionem urbis collocati et dispositi*:" so that they might be "on an expedition" even when in Rome itself, if they were called out to defend the city. He goes on: "*Falsum ergo stationarios ac limenarchas non recte testaturos jure militari, quia non sint in expeditionibus.*" Therefore, it was not strictly those alone who were actually on an expedition who might make a military will, but those who were at home, provided they were called out *ad defensionem urbis*. And he refers for his authority to Ulpian.† "*Miles est,*" he continues, "*etiamsi in nostro non est; et nauarchi ac triearchi classium, jure militari testare possunt; et in classibus omnes remiges ac nautæ milites sunt; item et vigiles.*"

So far as we have gone, therefore, it is clear from the passages I have read from the *Digest*, and the *Code*, and

* *In vocibus.* Ed. Genev. 1645.

† *De Bon. Possess.* l. i. § ult.

ments, that the privilege did not extend to soldiers in any situation; that they must be *in expeditione*, or *in* or *in hybernis*, or they must have been called out for the purpose of defending the city. Now, we find by the first book of the *Institutes*,* which treats expressly of this subject, that the privilege was limited to persons in certain situations:—"Supradicta diligens observatio in ordinationibus [principalibus] remissa est. Nam quamvis ii legitimum numerum testium adhibuerint, neque aliam rationem sollemnitatem observaverint; recte nihilominus valet, videlicet, cum in expeditionibus occupati sunt; quod nostra constitutio introduxit:" that is the law he added in the *Digest*, as to the *testamentum militare*. "Quoquo enim voluntas ejus suprema inveniat, sive scripta, sive sine scriptura, valet testamentum ex voluntate ejus. Illis autem personis, per quæ citra expeditionum necessitatem in aliis locis suis ædibus degunt, minime ad vindicandum tale privilegium adjuvantur; sed testari quidem, etsi filii familiarum propter militiam conceduntur." Therefore, it is clear by this later law, modifying the law as it originally was, that the privilege was confined to persons *in expeditione*, and that if a soldier made a will "*citra expeditionis necessitatem, in aliis locis, vel suis ædibus*," he must comply with the general law as to the solemnities which were necessary to give effect to a will at Rome. In the next (§3) it is said:—"Sed hactenus hoc illis de principalem institutionibus conceditur, quatenus militant, et in castris;" so long as they were engaged in actual war. "*Postea vero veterani, vel extra castra [alii] si faciant adhuc testamento: communi omnium civium Romanorum id facere debent:*" therefore, the *veterani* (who were analogous, as suggested in the Argument, to general officers in the English army, but persons who had served in some war for which they had engaged, and had been discharged on *honestam causam*) were excepted from the privilege. The section continues:—"Et quod in castris fecerint

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testamentum non communi jure, sed quomodo voluerint, post missionem intra annum tantum valebit:" after they had been discharged, if when *extra* and not in *castris*, they should make a will, it must be "*communi omnium civium Romanorum jure.*" It goes on:—" *Quid ergo, si intra annum quis decesserit, conditio autem hæredi adscripta, post annum extiterit? an quasi militis testamentum valeat? Et placet valere, quasi militis.*" So it only lasted for twelve months after they had been discharged. It is, therefore, clear from the *Digest*, the *Code*, and the *Institutes*, that the privilege was confined to persons engaged in *expeditione*; that it was not extended to all degrees of soldiers under all circumstances, but only to those *qui militaverant*, or who were *expeditionibus occupati*. And there is a note by a Commentator on the *Institutes*, who sums up the whole law on the subject,—Vultei, *De Testamentis Ordinandis*.* He says:—" *Olim ante Justinianum, hoc privilegium commune erat militibus omnibus, sive in expeditione, sive extra eam essent; sed Justinianus restrinxisse illud videtur ad milites eos qui in expeditione degrent. Non igitur existimandum est si testamentum est militis testamentum illud esse militare; nam sive jus quod Justinianus postea introduxit species, multi sunt milites qui tamen non militant aut in expeditione degunt.*" Nothing can be more satisfactory to shew that, according to the Roman text law, and the Commentators, this was not a privilege granted universally to all soldiers, but only to those who were in the situations I have mentioned.

Result of text
 and comments.

So much for the text law, and the principles derived from that law. I now come to consider our own authorities, and the first is Swinburne, a very high authority on the doctrines of testamentary law and of the former Statutes. Swinburne† speaks of three sorts of privileged testaments, and the first of these is the *testamentum militis*, of which he gives a long explanation, and he says (in § 14): "After we have viewed what privileges do belong to soldiers, it shall be expedient to shew what manner of soldiers they be to whom these privileges are granted. Wherefore,

* Lib. ii. c. 10.

† P. 1, §§ 13, 14.

understand that there be three sorts of men, which in law by the name of soldiers. The first be *sati*, 'armed soldiers;' the second be *milites literati*, 'armed soldiers,' as doctors of the law; the third *lites cœlestes*, 'celestial or heavenly soldiers,' as and divines: for so the law doth term them. Of the first sort, either they be such as lie safely in place of defence, or besieged by the enemy, readiness to be employed in case of invasion or rebellion then they do not enjoy these military privileges: this there may be some doubt; "or else they be in expedition," the term used in the *Institutes*, and *Code*, "or actual service of wars, and such are at least during the time of their expedition, they be employed by land or water, and whether horsemen or footmen." Therefore, according to Swinburne was the interpretation of the words used in the Parliament, and only those soldiers were entitled to the privilege who were "in expedition, or actual service of war; the very words of the Acts,—“in actual military service;” and it is probable that the words in the Statute were taken from Swinburne, with this slight alteration. Mr. Burge (whose work was cited in Argument) uses the words "*qui in expeditionibus sunt*," by "actual service, that is, actual service of war." It is nevertheless, that the words should have some meaning, and in some degree limit the privilege. And the Court has been indebted to the industry and learning of counsel for proofs that all the Codes of Europe have so granted the privilege, a number of instances having been produced from different writers and different codes. The Court has referred the authorities to which the Court has thought fit to refer, to shew the principle of the exemption, admitted to be a privilege borrowed from the Roman law, and engrafted upon our own Statute law, and that universal privilege, but is enjoyed by soldiers only in particular situations, and, therefore, where our own law

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* *Col. Law*, 4 vol. 394.

MAY 19. furnishes no actual decisions to guide the Court in putting an interpretation upon particular words, which must have some meaning or limitation, the Court may derive some assistance, as to the principle of the exemption, from these authorities.

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Case of
Shearman v.
Pyke.

But, as I have before stated, there is one case in which this question has received some degree of interpretation at least from a decision in these Courts. The case is that of *Shearman v. Pyke*, Hil. T. 1724.* The case was this: J. W. enlisted as a soldier in the service of the East-India Company, and accompanied Governor Pyke to St. Helena, who employed him in his service as cook, and gave him wages, in addition to his pay as a soldier. In 1718, the governor left St. Helena, to proceed to Bencoolen, but at Batavia, in 1719, they were informed that the factory at Bencoolen had been cut off by the natives. They sailed from Batavia to Moco Moco, and thence to Madras, and thence to Bencoolen, to re-establish the factory. So far they were on an expedition. About October, 1720, they returned to Moco Moco, and in January, 1720-21, J. W., being ill with a fever and flux, died in the hospital. Being asked by J. P. and M. S. to make his will, he replied, "I give all I have to my master, and I will give nothing from him, and I'll make no other will; he may dispose of it as he pleases." On the 22nd January, two days after his death, the witnesses signed a schedule of the contents of the will, and made oath thereof at Moco Moco. J. P., one of the witnesses, died on the voyage. This will was propounded by Governor Pyke, as a nuncupative will, and opposed by Shearman, one of the next of kin. The case was argued on both sides. Reference was made to the Stat. 29 Car. 2, and it was contended that it did not apply to the deceased, as a soldier in actual military service, for that the exemption was not restricted to soldiers in an engagement or in imminent danger, but was given on the ground of *imperitia* and *ignorantia juris*; that a seaman at sea was not in danger, and that the privilege should be construed in the most extensive

* Dr. Andrews's MS. Notes.

anner; and reference was made to Cujacius, and, in fact, arguments used were similar to those employed on the sent occasion. On behalf of the next of kin, it was ued, that the exemption was confined to soldiers in an agement or actual danger, otherwise, it would include a lier on duty at Whitehall. The words of the Court are e : "It is agreed, the will cannot be good unless within privilege. A mariner on shore is not within the Sta-. Those who are enlisted in the service of the Company e the same privilege as those in the service of the Crown, l though he acted as cook, that does not take away the vilege of the soldier. He was not only a soldier, but was on an expedition. The proof is not clear whether the edition was over or not; one witness swears he died on passage; he was certainly engaged in the service. Will nounced for." So that it appears doubtful on what par- lar ground the decision turned; whether because he was ertainly engaged in the service," or whether, because it s doubtful "whether the expedition was over or not," l in returning to Moco Moco, he became ill, and died in : hospital.

This is a decision on the question as far as it goes. If it l been decided on the ground of the deceased having been gaged in actual service at the time, it would have been in nt; but, unfortunately, the words at the end of the sentence y render it doubtful on what point the decision turned. t I think it clear that the Judge, who was Dr. Bettes- rth, considered that the question had not received a licial decision, and it appears that he had directed the legation to be reformed by setting forth the expedition on ich the party deceased had been engaged; so I presume at the Allegation had been objected to on that ground. t I think it, on the whole, clear that the principle opted in that case, with the limitation "in actual mili- ry service," is that every soldier was not entitled to the emption contained in the clause of the Statute of Charles but that it was confined to such as were on an expedi- n—in actual military service, that is; *in expeditione*. The estion, then, comes to be considered, what was the situa-

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MAY 19. tion of General Drummond at the time when he made this will.

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Not a valid
will.

Allegation
rejected.

The Allegation pleads that the deceased, at the date of the will and of his death, was a major-general on full pay. Then, if this were sufficient to give the exemption, every major-general in the army on full pay, and every full-pay officer, would be in the same situation. Then it is pleaded that the duties of his office extended to the troops of the Royal Artillery abroad as well as in England; that he was subject to military law, and liable to be sent upon foreign service when required (so is every officer and every soldier in the corps); and that he was as completely in the actual service of her Majesty as if serving with a British regiment on foreign service—but so is every officer and soldier: this is a general and universal description, applicable to all on full-pay or half-pay—all are in the actual service of her Majesty. I do not consider that the words “in actual military service” apply to a person in General Drummond’s situation, not living within the walls of a garrison, as far as appears, but *suis ædibus*; and even if he were, I am of opinion he was not “in actual military service.” On this ground, therefore, I am of opinion that this is not a valid will, not being attested as required by the Act. It would, consequently, be of no use to admit the Allegation to proof, as all the facts are before the Court, which could not come to a different conclusion if it had the evidence before it. I am of opinion, therefore, that I must reject this Allegation. Of course, it is with very great pain that the Court finds itself under the necessity of so doing; but I think it best to express my opinion of the law at once. Although this decision may place the family of General Drummond in an unpleasant situation, I am not prepared to say that the privilege would be advantageous to the great body of the army, which it would leave open to fraud, imposition, and malpractices; I think, therefore, I do not inflict a great injury upon them by delivering this opinion of the law. I am of opinion that I ought to reject this Allegation, and I do reject it.

Proctors:—*Cherrill*, for the executrix; *Tebbs*, for the next of kin.

BLAKE v. KNIGHT.—*Cause.*—This was a cause of bringing into the Registry the probate of, and proving in solemn form, the will of Edmund Blake, of Nether Stowey, Somerset, who died 17th December, 1838, aged 70. The will bore date 6th September, 1838; probate was granted in common form on the 5th January, 1839, and was called in on the 19th February, 1842, and the executor put in proof of the will *per testes*, on the part of John Blake, the brother and one of the next of kin of the deceased, who left a widow as well as a brother, but the widow had died about two years before the probate was called in. The purport of the will was to provide for the widow an annuity of £150 for her life, and to give the bulk of the property (amounting in the whole to £7,000) to John Knight, the executor named in the will. The paper was all in the handwriting of the deceased, and it purported to have been “signed, sealed, published, and declared by the testator, as and for and to be his last will and testament, in the presence of” three witnesses, and to have been attested by them in his presence, and that of each other. It was disputed on the ground that it was not proved that the deceased signed the paper in the presence of the witnesses, or that the signature was on the paper at the time they were present and attested it, or if it was, that the deceased acknowledged the signature in their presence.

Attestation.—Three subscribed witnesses to a will, purporting to have been signed, sealed, published, and declared in their presence, depose that it was not acknowledged, and believe that it was not signed, in their presence, or when they attested, but will not swear to that extent:—Held, that the circumstances supported the valid execution, and that the Court is not bound, in such a case, to require that the witnesses should depose affirmatively.

The attesting witnesses deposed as follows:—

William Brewer, a small farmer, aged 62, stated that the deceased had been writer to an attorney, but lived latterly independent. On the day the will was attested, the wife of the witness (who was then in business as a tailor) told him that the deceased “was wanting him, his son, and his apprentice, to go up to him to sign his will, or witness his will, or something of that sort.” It was the evening; and witness went up to the deceased’s house, taking his son and his apprentice Sellick. When they got to the house of the deceased, Mrs. Blake opened the door, and shewed them into a small room on the ground-floor, where the deceased was sitting with his back towards them. The deceased, who was deaf, turned round on his chair to look at them, when his wife announced their arrival; he did not rise; he was rather crippled in the leg. The witness sat down on one side of him,

Evidence.

MAY 19. near the fire; the other two a little off from him, on the other side. The room was very small. There was nobody else in the room but the witnesses, the deceased, and his wife, except a little child. After talking of indifferent things, the deceased took out a paper either from the drawer of the little table at which he was sitting, or from out of a portable writing-desk that was upon it. It was folded, and he spread it abroad before them, saying, "This is my will; it is a small will, written on one sheet of paper, and all on one side;" and, turning to the witness, he said, "Will you sign it?" or "Will you witness it?" Witness took the pen and wrote his name: most likely the deceased told him where to write it, or he should not have known; he dare say the deceased said to him, "Put it here," where he did write it, in the presence of the deceased and of the other witnesses. As soon as the witness had written his name, he went back to his seat, and sat down again. Then the deceased asked the others to sign, and they did. When they had so done, the deceased put the will away again in the drawer or desk. Before they signed, the deceased said that "he had made a mistake in it, but he had rectified it at the bottom." He did not sign the paper in witness's presence; he did not use pen or ink while witness was with him; he did not say that he had written it himself, otherwise than as by what he has deposed; he did not say that he had signed it. The witness cannot say that it had been signed when he saw it; he would not swear that Mr. Blake's name was not to it when he signed his; but he did not see it; that is, he does not remember that he saw it. He has no recollection at all of having seen Mr. Blake's signature at the foot of the will when he signed his name to it; he is very sure that it was not signed by Mr. Blake in his presence, and that he did not say of any name to it that it was his, or of his writing, or any thing to that effect. The paper being shewn to the witness, he said that the deceased wrote nothing in his presence on that occasion. He did not see the name "Edmund Blake" at that time, as he saw it now, opposite the seal at the end of the will; there was no seal there then; of that he is certain; and he does not think that the name was there, but he does not swear that; he is sure that, if it was there, the deceased did not by any thing he said acknowledge it to be his signature. He did no more than say it was his will, and that it was a short or little one. Witness thinks now, that when the deceased held the paper in his hand, telling them that it was his will, he read the first words of it to them: "This is the last will and testament of me, Edmund Blake;" as much as that he thinks he read aloud.

On interrogatory, the witness said the room was not above nine

r ten feet square. The deceased was sitting at a little table not far from the fire-place; there was just room enough for the witness to sit almost by the side of him. Mrs. Blake sat opposite the witness, on the other side of the fire-place, and the other witnesses on the other side of Mr. Blake. Each person in the room could see what any one of the others did. When the witness was about to sign his name, he left his place and went round the deceased. He was at his right hand when he wrote his name. The only way in which that change of his position could affect the view of the other witnesses, would be, as he supposes, that they saw almost better what he (witness) did than if he had been on the side of the deceased on which the witness sat. He did not know the contents of the clause of attestation.

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Blake v. Knight.

Charles Sellick, tailor, aged 20, stated that, on the day in question (his birth-day, he being then seventeen), he went with Mr. Brewer to the deceased's house, to sign his will. They found him sitting in a small room, and he said "he wanted them to sign his will." They all sat down, the last witness between Mr. Blake and the fire-place, and the other two at the other side of the room. The deceased then took his will from a writing-desk brought to him by his wife; he took it up by a corner of it, and said "Mine is a short will; it is written on one sheet of paper." He then asked the last witness to put his name to it, and for that purpose to sit down at a table on the right hand of the deceased, who placed the will there, open. Brewer wrote his name where the deceased pointed out to him. The younger Brewer and witness then did the same, the deceased pointing out the place to each in turn. Mr. Blake read a part of the beginning of the will; just so much as said that it was his will; and he pointed out to them a place in the middle of the will, where he had made a mistake, which he said he had corrected at the bottom; he made them all stand up to see where the mistake had been made, where he had written the correction of it at the bottom. The witness is quite sure that Mr. Blake did not sign the will then or at any time in his presence; he does not remember having seen his name to the will, and he is quite positive that Mr. Blake did not point it out to him. He said it was a will, all in his own handwriting. The witness will swear, to the best of his belief, that the name "Edmund Blake" at the foot of the will was not upon it when witness wrote his name there. He was a youngster, unused to the form of such things, and did not think any thing of it. He is quite certain that the seal was not there at the time; he will not swear positively that the name was not, but only that he does not remember it.

MAY 19. On interrogatory, he stated that the room was very small, and that nothing could be done without his seeing it. He did not know the contents of the clause of attestation.

Blakey, Knight.

George Brewer, tailor, aged thirty-six, deposed that, on their entering the room, Mrs. Blake, telling the deceased that they were come up to sign his will, brought him a writing-desk. The deceased held up the paper by one corner, and told them it was his will, and something about a mistake he had made in it, and how he had rectified it at the bottom, shewing them where the mistake had been made and how he had rectified it. He read some of the will,—some of the top part, and some of the bottom. He cannot say whether the deceased signed the will or not; witness did not take any notice of that. He remembers Mr. Blake dipping the pen in the ink and giving it to them; but whether he wrote anything himself or signed his name to it, he cannot say. He does not recollect any thing about a seal to it. He had a little child with him, and his attention was to the child. Mr. Blake might have signed his name to the will in their presence and witness not have noticed him. He was a very tall or long man, and he lounged rather over the table. Witness is rather doubtful if his father could have seen, as he sat, what Mr. Blake did then. The witness did not know that it was requisite that he should see the deceased sign his will; and whether he did or did not sign it in his presence and that of the other witnesses, he is no further able to say. His memory is bad, and he did not know he should be called upon.

On interrogatory, he deposed that he did not know the contents of the clause of attestation when he signed his name; he would not swear that it is not what Mr. Blake read, but his memory would not serve him to say if it were or not; and he was not paying particular attention.

1842.
Dec. 22.
ARGUMENT.

Addams, D., for the executor.—There were many persons who might have contested this will, if they had pleased, and one of them was the widow. She would have been a competent witness in this cause, and might have been examined to prove the will. The party opposing the will has delayed his opposition till after the widow's death. There is no substantive proof that the will was not executed in conformity with the Act; but the witnesses, speaking now, deposing against their own act, have some doubt whether the will was or was not signed by the deceased in their presence. But this doubt is insufficient to overthrow the will. The

testator had been a writer in an attorney's office, and a more methodical instrument was never seen. The Court is asked to believe that the will was not signed at the time of attestation, from a sort of inferential deposition of the witnesses, who do not recollect whether the name was there or not, but who will not swear that it was not.

Elphinstone, D., on the same side, cited *Ellis v. Smith*.^{*} *White v. British Museum*.[†] *Wright v. Wright*.[‡]

Haggard, D., for the brother and next of kin. The Statute requires that a will shall be signed by the testator at the foot or end, and that the signature shall be attested by witnesses. What is meant by "attest?" The taking up the paper and saying, "This is my will,—attest it," is not enough to satisfy the requisites of the present Statute. [PER CURIAM.—There is no affirmative evidence that the will was signed at the time, and the witnesses do not recollect that they saw the signature; but there are cases of wills pronounced for in opposition to the deposition of witnesses: the Court would not believe them. If these questions are to be raised, no executor can venture to take probate of a will in common form; in every case the paper must be propounded.] The witnesses are certain that there was no seal, and the name is so connected with the seal that it could not have escaped attention.

Harding, D., on the same side.

Addams, in reply. There is positive evidence of signing in the presence of the witnesses in the attestation-clause.

Elphinstone. A will is not a will till it is signed. *Re Olding*.§ Consequently, a testator's acknowledgment of his "will" is an acknowledgment of his signature.

PER CURIAM.—This is too important a case to be decided now. *Cur. adv. vult.*

SIR H. JENNER FUST.—The property, at the time when the will was proved, was sworn not to amount to £7,000, and consequently, as the widow, if the deceased was dead intestate, would have been entitled to one half of this sum

^{*} 1 Ves. jun. 11. [†] 6 Bing. 310. [‡] 5 M. & P. 316.

§ 1 Notes of Ca. 170.

MAY 19. (there being no child), and the brother to the other half, the interest of the widow would have been larger under an intestacy than under the will, since an annuity of £150 is not equal to £3,500 ; so she would have been a competent witness to prove the will, as it would be to her prejudice.

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It is alleged that the brother was ignorant of the existence of the will at the time of the testator's death ; yet no steps were taken to call in the probate from December, 1838, when the deceased died, till July, 1842, when the executor was put on proof of the will. Under these circumstances, the party opposing the will cannot be entitled to any very favourable consideration ; he is entitled to the benefit which the law will give him, but not to any beyond the law.

Facts on face of the will.

Before I consider the evidence, I will look at the will itself. The deceased is described by one of the witnesses as having been a writer to an attorney. The will is very clear and distinct ; it appears to have been written with great care and deliberation ; it is of some length, reciting the different descriptions of property he possessed ; and in one part certain words were inserted by mistake, which were struck out by him, and the alteration is adverted to in the attestation-clause, at the conclusion of the will. The attestation is very special in itself : " Signed, sealed, published, and declared by the said Edmund Blake, the testator, as and for and to be his last will and testament, in the presence of us, who, in his presence, at his request, and in the presence of each other, have subscribed our names as witnesses, the words ' dated twenty,' in the sixteenth line, having been first obliterated." Nothing can be more distinct and precise than this attestation-clause ; and on the face of the paper, with such an attestation-clause, it would be almost impossible for any person to entertain a doubt whether or not it had been executed within the provisions of the Act.

The evidence.

According to the first witness, William Brewer, the deceased produced the paper either from a drawer or a writing-desk ; it was folded, and he spread it open ; he called the attention of the witnesses to a mistake in the body of the will, and to the correction of it in the attestation-clause ; and he read so much of the will as " This is the last will and

ment of me, Edmund Blake ;" he asked him and the witnesses to sign it as witnesses to his will, describing his will,—“ This is my will ;" but the witness does not that the name “ Edmund Blake ” was there at the time, though he will not swear it was not, but he is sure the deceased did not acknowledge it to be his signature, if it was, and it was not signed in their presence. From this deponent's evidence, therefore, it would appear that the paper was signed at the time when they attested the execution

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The second witness is the apprentice, who says he was a journeyman at the time, and did not think much about the matter, and therefore, possibly, he may have forgotten the circumstances. He will not swear positively that the name was not there, but only that he did not remember it.

The other witness is the son of the first witness. He remembers the deceased dipping the pen in the ink and giving it to the witnesses ; but whether he wrote any thing with it himself, or signed his name, he cannot say. Neither he nor the other witnesses knew the contents of the attestation clause at the time they signed the will. Now, how can that be when the deceased took such pains to point out to the witnesses that the mistake made in the body of the will was corrected in the attestation-clause ? It is utterly impossible to suppose that they did not know what they were doing ; but they seem very unwilling to recollect any thing. The third witness says : “ I did not know the contents of the clause of attestation to it when I signed my name ; I would not say that it is not what Mr. Blake read ; but my memory cannot serve me to say if it were or not, and I was not giving particular attention to what was read by the deceased.”

No other witnesses have been examined to prove that the indwritings of the body of the will and of the signature of the deceased's.

These are the circumstances under which this will comes before the Court, on the evidence of the three witnesses who have subscribed their names as attesting the execution,

MAY 19. —that it was signed, sealed, published, and declared by the testator, as and for and to be his last will and testament, in their presence; yet the witnesses now say they did not know the contents of this attestation-clause, though they signed their names to it.

Result of the evidence.

Now, neither of the witnesses will depose affirmatively that the will was signed by the testator, or the signature acknowledged by him in their presence; but they will not swear positively that it was not there at the time, though the last witness does depose that the deceased himself dipped the pen in the ink. Now, in the first place, is it absolutely necessary that the Court should have witnesses deposing to the will having been actually signed in their presence, or that the Court should have positive evidence that the deceased acknowledged his signature in the presence of the witnesses? Is it indispensable in all cases that the witnesses should concur in the same story, or is it necessary for the Court, where the witnesses will not so swear, to pronounce against the will? I apprehend it is not so, and that the Court will take all the circumstances into its consideration, and form its opinion from all the circumstances of the case. Now, here, the witnesses are deposing upwards of three years after the transaction took place. The deceased had been a writer to an attorney, and must have been acquainted with the law. He produces the will; it was folded at the time, and he opens the paper; he reads the commencement, which describes it as his last will and testament, and he is not satisfied with this, but he tells the witnesses that it is "his will;" he calls their attention to a mistake in the body of the will, and to the correction of it in the attestation-clause; and one of the witnesses will not swear that he did not read to them the clause of attestation. Now, the paper appears with the name of "Edmund Blake" affixed, and with a seal, whereas the witnesses swear that there was no seal at the time. But I have no doubt that the paper was signed at the time when the witnesses were present, or at the time when they were called to attest. The memory of the witnesses may have failed as to the circum-

ances, and, deposing as they do at the end of four years, is too much to trust to the memory of witnesses without reference to circumstances. I am of opinion that the Court under the necessity of attending, and must attend, to all the circumstances of the case, in order to see whether or not the instrument was duly executed by the deceased, either by signing his name in the presence of the witnesses, or by signing it before and acknowledging it in their presence.

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Blaker, Knight.

I am of opinion, that the producing the paper and telling the witnesses that it was his will, it being all in his own handwriting, and asking them to witness it, was a sufficient acknowledgment, and that it is not absolutely necessary to point out the signature, and say, "This is my signature," the will, when produced to the witnesses, had the signature to it. In *Ilott v. Genge*,* this was not the case. In *Jackson v. Jackson*,† a new trial has been granted; so that there is some doubt whether there was a due execution of the will in that case. In *Ilott v. Genge*, the object of the deceased was to conceal from the witnesses what the will was, and he concealed the signature, taking great pains to do so. Here every thing was done in the most open manner, and every thing was called to the attention of the witnesses, who will not undertake to swear that the signature was there, or that the deceased acknowledged it at the time. But I think that the Court is not bound to require that the witnesses should depose affirmatively when they have put their names to such an attestation-clause. I am of opinion that the will was signed by the deceased either in the presence of the witnesses or before; and his acknowledgment that it was his will, his name being to it, was quite a sufficient acknowledgment of his signature. I therefore pronounce for the validity of the paper, and decree the probate to be re-delivered out to the executor.

Probate to be re-delivered out.

Haggard asked for the costs of the opposition to be paid out of the estate. Costs.

* 1 Notes of Ca., 572.

† *Ibid.*, 575.

MAY 19. *PER CURIAM*.—There is no doubt that his own costs should be paid by the brother: I only doubt whether the Court ought not to condemn the brother in all the costs. To call in the probate after such a length of time is a great hardship on Mr. Knight, the executor. I make no order as to costs.

Proctors:—*Shephard*, for the party proceeding; *Pitcher*, for the executor.

END OF EASTER TERM, AND OF THE SITTINGS
AFTER TERM.

Admissions during the Term:—

AS PROCTORS.

April 15.—EDMUND SAMUEL POTYNDER, Esq.
EDWARD WILLSON CROSSE, Esq.

TRINITY TERM, 1843.

High Court of Admiralty.

MAY 26.

THE "RELIANCE."—*Summary Petition.*—This was a *Wages.*—The question as to the admission of a Summary Petition, in a representative suit for wages, by the widow of a mariner lost with the ship (a part of the hull, stores, and cargo being saved, not with the aid of the crew), no freight being earned, allowed to sue the owners for his wages. The *Reliance* sailed from England in June, 1841, for the East-Indies. She touched at Bombay, and thence proceeded to China, which she left, on her homeward voyage, in March, 1842. In November, she was wrecked on the French coast, and almost all the crew perished. No freight was earned on the homeward voyage, but part of the hull, and some of the stores and materials, as well as of the cargo, were saved, not by the exertions of the crew. The widow of one of the seamen, who was lost, sued the owners of the ship for the wages due to her husband for the homeward voyage, the wages for the outward voyage having been paid up to the date of the vessel's departure from China.

Haggard, D., in support of the Petition, cited *The "Neptune,"** and *Jesse v. Roy*.†
Addams, D., *contra*.

DR. LUSHINGTON.—This case resembles that of *The Judgment*. "Neptune" in every particular, except that, in that case, the seamen contributed to saving so much of the remains of the ship and materials as formed a fund, out of which the wages could be paid. In the present case, nothing was done by the mariners towards saving the portions of the ship and stores which have been saved. I have now to determine,

* 1 Hagg. A. R. 227.

† 1 Cr. M. & R. 316. 4 Tyrhw. 626.

MAY 26. whether this circumstance forms such a distinction as should lead me to reject this Summary Petition.

The Reliance.

It has not been denied, that, provided the two cases are similar, the case of *The "Neptune"* is an authority perfectly conclusive; and I think, if applicable, it must be held conclusive: not only is it a decision of the most able and experienced Judge that ever filled this chair, but it is conformable to all principles of law and equity. Moreover, the judgment in that case was pronounced in 1824, and came under the knowledge of Lord Tenterden, in his own last edition of his work on *Shipping*, as also in a subsequent edition prepared under his sanction; and the decision has also been confirmed by the high authority of Lord Lyndhurst, in the Court of Exchequer, in the case cited by Dr. Haggard. Now it appears to me that, in this judgment of Lord Stowell, which I have most carefully considered before coming into Court, although he discusses at considerable length the law and usages of other countries, as to seamen being salvors, he does not form his ultimate decision on that reasoning; and Lord Stowell was perfectly right in so doing. Let us for a moment adopt the principles of salvage in considering this case, bearing in mind that seamen are remunerated by fixed wages. Now, salvors are rewarded in proportion to the services rendered, the danger to which they are exposed, and the exertions they are compelled to use; if the mariners are to be considered as entitled to wages in a case of this nature, as salvors, it is revolting to every principle on which salvage remuneration is given: to give the mariners their wages for services in the nature of salvage, as distinguished from services in the nature of navigation, would in some cases be to give them more than they were justly entitled to, in others to deprive them of a fair compensation. It is quite clear that the judgment of Lord Stowell did not proceed on any such ground. To look further into the principle: If the right to wages is grounded on the doctrine of salvage services performed by the mariner, there might be a case where the measures tending to the ultimate saving of the ship might be effected by the united efforts of the whole crew, and a moiety of them

Be drowned before those measures were effected ;
 ng to the argument used against this Petition, those
 at their lives would be debarred from any share in
 uneration. If a seaman dies in the actual perform-
 his duty, he (according to the doctrine contended
 II, by the act of God, be deprived of his share of
 uneration : the injustice of such a decision is appa-
 In many cases, the saving of the wreck and stores
 a matter of mere ordinary labour, and yet, according
 distinction, the mariners who get safe to shore will
 e whole benefit, exclusively, depriving the widows
 ildren of the parties drowned from partaking with
 The ground on which the case of *The "Neptune"* was
 d is this ; that the mariners were entitled to their
 if they had performed their duty to the utmost of
 ower ; to use Lord Stowell's words, they are entitled
 g to the last plank of the ship in satisfaction of their
 * The only ground on which the principle of sal-
 was introduced into the case is this ; it was impos-
 o conceive a case where the materials of the vessel
 had come on shore and been collected by the
 ons and labour of the crew, in which they would not
 titled to benefit by their exertions. Lord Stowell
 uces the question with his usual foresight and clear-
 " On all views of the relative justice between the
 s, there can be no doubt that the rule of wages has
 vantage upon the clearest grounds ; but take it upon
 ost naked principles of law applying to it ; the con-
 covers the whole ship, one part as well as another,
 o one part more than another, with the mariner's *lien*.
 t separated by a storm is not disengaged by that
 nt from that *lien* ; if it be recovered, it is recovered
 art of the primitive pledge mortgaged to the mariner.
 ; when does the authority of the master cease ? His
 ity does not certainly merge in the misfortune ; nor
 men at liberty, without staying a reasonable time for
 covery of parts of the ship and cargo (if there be any

MAY 26.

The Reliance.

* *The "Juliana,"* 2 Dods. 504.

MAY 26. prospect in his judgment of such recovery), immediately to
The Reliance. disperse themselves over the country on the shores of which
 they have encountered the mischance, without some discharge
 from him."

I am clearly of opinion that the case of *The "Neptune"* applies to the case I am now considering; in
 Petition ad- that decision I perfectly concur, and I admit this Summary
 mitted. Petition.

Proctors:—*Deacon*, for the mariner; *F. Clarkson*, for the
 owners.

Prerogative Court of Canterbury.

MAY 30.

A will signed IN THE GOODS OF GILES DAVIS, DEC.—*Motion, ex-parte.*
 by the testator —The deceased died 9th April, 1843, possessed of per-
 only at the foot sonal estate value £400. He left a will in his own hand-
 of the first page, writing, which commenced thus: "Walton on Thames,
 containing all the will, except the appoint- first day of April, 1840. This is my last will and testa-
 ment of execu- ment." It went on to dispose of his property, freehold
 tors, and sub- and personal, amongst his widow and children, and at the
 scribed by the end of the last page was signed "Giles Davis. My last
 witnesses on will." At the beginning of the next page appeared the
 the second following words: "I also appoint my wife, Jane Davis,
 page, after the executrix, with my son John Davis, and my son Giles
 appointment of executors, — Davis, executors. March 24th, 1843. Witnesses, R. S.,
 of executors, — J. D., H. L." It appeared that, on the 24th March, the
 Held to be suf- deceased, being ill in bed, requested his brother-in-law,
 ficiently exe- R. S., to bring him his will from a chest of drawers in
 cuted, except so the room, and to read the same. R. S. having, in allu-
 far as regards sion to the word "witnesses" appearing at the end,
 the appoint- suggested the propriety of the will being attested, the de-
 ment of execu- ceased concurred, and requested R. S. to be one of the
 tors. witnesses and to send for J. D. and H. N. (mentioning
 them by name), two of the deceased's workmen, for the
 same purpose. R. S. accordingly sent for them, but,

before their arrival, in the presence of the deceased alone, he subscribed his name to the will as an attesting witness. J. D. and H. N. soon after entering the room, the deceased, addressing them, and looking at his will, which lay on the table by his bed-side, with the first page and his signature at the end exposed to view, said "I want you to sign my will," or "my little will," and R. S., in allusion to and in continuation of such remark, said "as witnesses," or "merely as witnesses." Upon which J. D. and H. N. subscribed their names to the will in the presence of each other and of the deceased, and shortly after left the room. R. S., by direction of the deceased, endorsed the will "The will of Giles Davis," and inclosed and sealed it up in an envelope, which he also endorsed and deposited in the drawer from which he had taken the will.

MAY 30.

Davis, dec.

Elphinstone, D., moved for probate of the will (without Motion. the clause appointing executors) to the widow, as executrix according to the tenor, under the following clause in the will: "I also give to my wife, Jane Davis, all my household furniture, plate, books, and stock in trade and book-debts, out of which she is to pay all my lawful debts, and whatsoever remains to be at her own disposal, to do as she thinks proper with:" in addition to the freehold property for life.

SIR H. JENNER FUST.—The witnesses did not see the deceased sign the will, but the affidavits are strong to shew that the paper was produced to them as his will, with the first page exposed to view, to which the name of the testator was subscribed, and this signature is proved to be in his handwriting. By the decisions of the Court,* this is sufficient to entitle the paper to proof, with the exception of the part not signed by the testator; but there must be the consent of the parties prejudiced. You pray probate to the widow as executrix according to the tenor: is she so? Is not the bequest to the widow a specific bequest, subject to the payment of debts? [*Elphinstone*.—It goes on: "Whatsoever remains to be at her own disposal:" so that she is residuary legatee.]

* *Re Mary Warden*, 2 Curt. 334; *Ilott v Genge*, 1 Notes of Ca. 572; *Blake v. Knight*, ante, 337.

MAY 30.

Davis, dec.

No; this is not the general residue; there is other property; the general residue is not disposed of, and it is clear that it was not the deceased's intention to make her sole executrix, as he intended to appoint other persons. Administration with the will annexed may be decreed to the widow, she being entitled to it, as there is no disposal of the residue; but I do not think she is executrix according to the tenor.

Administra-
tion with will
decreed.

With consent, administration with the will annexed decreed to the widow.

Prichard, Proctor.

This day, the Court directed that, in future motions, where the consent of parties was requisite, and the Case stated that the consent had been brought in, the proxy of consent should be actually brought into the Registry before the papers were sent to the Court.

JUNE 8.

A will, written on one side of a sheet of paper, and signed and attested on the lower part of the reverse side,—a blank between,—admitted to probate.

IN THE GOODS OF JOHN BULLOCK, DEC.—*Motion, ex parte.*—The deceased died a widower, leaving behind four children. He left a will, which was written on the lower half of a page of foolscap paper, beginning about the middle, "This is the last will and testament of me, J. B.;" on the reverse page, on the lower half (being the first side of the sheet), was written, "Witness my hand, this present 13th day of June, 1842;" then followed the signature of the deceased, and the following attestation-clause:—"In the presence of the testator, by his desire, and in the presence of each other, witnesses," and subscribed, "Hudson Gurney, Thomas Young." Mr. Gurney, one of the witnesses, in his affidavit, deposed that the deceased was his porter; that, on the 12th June, 1842, the deceased being very ill, he (the witness) suggested the propriety of his settling his affairs, to which the deceased assented, and expressed a desire to make his will, observing that it would be a very short one; that, the deceased being of a very close and reserved disposition, thinking he would wish to conceal the disposition of his property, the witness

told him that he and Mr. Young, the surgeon who attended him, would witness it if he pleased, and, taking a sheet of paper, folded it down from the middle, and told the deceased he might make his will on the upper part of the side so folded, so that any witnesses subscribing their names on the lower part of the fold would not see the contents; that he left such paper with the deceased, and on the following day, Mr. Young having come to see the deceased, the latter, on entering his (Mr. Gurney's) room, expressed a wish to execute his will, which he said he had written, and he then produced the very sheet of paper which the witness had given him the previous day, folded down, saying that the same contained his will, and he (Mr. Gurney), supposing it had been written on the upper part, above the fold, wrote on the lower part of the side so folded the words, "Witness my hand, this present 13th day of June, 1842," and the deceased then executed the will in the presence of him (Mr. Gurney) and Mr. Young, who both attested it. Mr. Gurney stated that he did not remember to have seen the outer side of the paper at the time of execution. The will, after execution, was taken possession of by the deceased. The property was about £600.

Jenner, D., moved (with consent of the children) for promotion. *Motion.*
 state of the will to the eldest son, named executor.

SIR H. JENNER FUST.—I am inclined to consider that, *Decree.*
 in this case, there has been a sufficient execution. The will is in the handwriting of the deceased. It is written on the lower part of one side of the sheet, and though there was room enough for the attestation-clause and the signatures of the witnesses on that side, yet, owing to a mistake, Mr. Gurney believed that the will had been written on the upper part of the same side of the paper, and wrote what he did on the lower part. Perhaps, strictly and literally speaking, it is not signed at the foot or end of the will. But I think, *Probate decreed.*
 with the consent of the parties, I am able to decree probate of the will, under all the circumstances. It is unfortunate that more pains are not taken to comply with the Act.

W. Townsend, Proctor.

JUNE 8.

Bullock, dec.

JUNE 8.

A codicil with-
out date, attach-
ed to a will of
1837, rejected
on circumstan-
tial evidence of
its date being
posterior to
1838.

IN THE GOODS OF MARK MORRELL, DEC.—*Motion, ex parte.*—The deceased died 20th March, 1843, leaving considerable property (£160,000). On the 25th September, 1837, he executed a will, in which he named his brother, J. M., sole executor and residuary legatee. At the time of execution of the will, in duplicate, one part was left with the deceased, and by his desire, R. M., his brother and solicitor, took the other with him, having told the deceased it was best to do so, in case of loss. About a fortnight after, the deceased desired to have such duplicate, which R. M. accordingly returned to him. On the 6th September, 1841, the deceased being in a room opposite to his bed-room, lying on a sofa, unwell, A. L., a female servant, by his desire, opened a secret drawer in his bed-room (being the same drawer in which she had, by his direction, in 1837, placed his will, then sealed up in an envelope), and the deceased told her to bring the paper which she would there find loose. A. L., accordingly, opened the drawer and took out the paper, the seal having been broken, and laid it on his table. A. L., after being absent from the deceased about two hours, went again to him, when he said he was glad she had come back, adding, “You take this paper,”—the one she had put on the table,—“and write your name there, and let it lie.” And placing his hand on the writing above his name (which she then saw written thereon), to prevent her from seeing any writing above his name, she signed her name over his, at the place he pointed out, and she then, by the deceased’s direction, replaced the will in the same secret drawer, which she locked, delivering the key to the deceased. On the day of the death of the deceased, R. M. found his will lying open in a drawer of a bureau in the dining-room, and observed certain crosses therein, and the following words and figures, all (except the signature of A. L.) in the handwriting of the deceased:—

Codicil of the will.

I give R. D. £10,000 [£5,000 erased].

I give J. D. £10,000 [£5,000 erased].

A. L.

Mark Morrell.

The two sums of £10,000 and the name of A. L. appeared to have been written at the same time, and with the same dark-coloured ink; the rest of the writing and the signature of the deceased were in ink that had lost its colour. A nephew of the deceased, whose legacy is marked in the will with a cross, died in 1842; another legatee, whose legacy is similarly marked, died in 1839, and the other legatee, whose legacy is so marked, A. C., a female servant, remained in the deceased's service till his death. The duplicate of the will has not been found.

R. Phillimore, D., moved for probate of the will as it originally stood, to the executor, without the codicil.

JUNE 8.
Morrell, dec.

SIR H. JENNER FUST decreed probate of the will as it originally stood, and rejected the codicil.

Fox, Proctor.

Archers Court of Canterbury.

JUNE 15.

THE OFFICE OF THE JUDGE PROMOTED BY SANDERS v. SAND.—*Cause.*—This was a cause of office, promoted, under Act 3 and 4 Vict. c. 86, in virtue of Letters of Request under the hand and seal of the Bishop of Exeter, by Ralph Sanders, of Exeter, gentleman, against the Rev. Henry Ersland Head, Rector of Feniton, in the county of Devon, diocese of Exeter, for having offended against the laws ecclesiastical having written and published, or caused to be published, in *Western Times* newspaper, of August 21, 1841, a letter, in which it is openly affirmed and maintained, that the "Catechism," the "Order of Baptism," and the "Order of Consecration," in the Book of Common Prayer, contain erroneous strange doctrine, and wherein are also openly affirmed and maintained other positions in derogation and depraving the Book of Common Prayer, contrary to the Statutes to the Constitutions and Canons Ecclesiastical of the

Articles against a clergyman for openly affirming and maintaining positions in derogation and depraving of the Book of Common Prayer,—sustained. — Form of proceeding under the Church Discipline Act.—Protest, on the ground of irregularity, overruled.

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Head.*

realm, and against the peace and unity of the Church. The Bishop of Exeter, in conformity with sect. 3 of the Act referred to (entitled "An Act for the better enforcing of Church Discipline," and which abolishes the old mode of proceeding in causes for the correction of clerks, and prescribes new modes and machinery), served Mr. Head with notice* of his intention, in conformity with the provisions of

Notice.

* The following is copy of the notice :—"To the Rev. Henry Erskine Head, Rector of the Rectory and parish church of Feniton, in the county of Devon, and diocese of Exeter. Whereas a certain letter, entitled, 'A View of the Duplicity of the present System of Episcopal Ministration, in a letter addressed to the Parishioners of Feniton, Devon, occasioned by the Bishop of Exeter's Circular on Confirmation, by Henry Erskine Head, Rector of Feniton, Devon,' was lately printed and published in a certain newspaper called the *Western Times*, dated 'Exeter, Saturday, August 21st, 1841,' in which letter it is openly affirmed and maintained that the 'Catechism,' the 'Order of Baptism,' and the 'Order of Confirmation,' contained in the 'Book of Common Prayer,' and administration of the Sacraments and other Rites and Ceremonies of the United Church of England and Ireland, contain erroneous and strange doctrine, and wherein are also openly affirmed and maintained other positions in derogation and depraving of the said Book, contrary to the Statutes 2 & 3 Edw. 6, c. 1; 5 & 6 Edw. 6, c. 1; 1 Eliz. c. 2; 13 Eliz. c. 12; and 13 & 14 Car. 2, c. 4 (all or some of them), and to the Constitutions and Canons Ecclesiastical treated upon by the Bishop of London, President of the Convocation for the Province of Canterbury, and the rest of the Bishops and clergy of the said Province, and agreed upon, with the King's Majesty's License, in their Synod, begun at London A.D. 1603, and against the Peace and Unity of the Church: And whereas there was and is a scandal and evil report against you, the said Rev. H. E. H., as the author and publisher of the said letter; and whereas We, Henry, by Divine Permission, Bishop of Exeter, rightly and duly proceeding under the authority and in conformity with the provisions of a certain Act of Parliament—to wit, the 3 & 4 Vict. c. 86, entitled, 'An Act for better enforcing Church Discipline,' of our own mere motion, think fit and intend to issue a Commission, under our hand and seal, to five persons, of whom one shall be our Vicar-General, or an Archdeacon, or a Rural Dean, within our Diocese, for the purpose of making inquiry as to the grounds of such report, in order to the institution, if need be, of such further proceedings, in pursuance of the said last-mentioned Act of Parliament, as the case may require: We, therefore, do by these presents, under our hand, give notice of such our intention to you, the said Rev. H. E. H., and We do hereby intimate to you that such our Commission, as afore-

said,

issue a Commission of Inquiry, in order to the if need be, of further proceedings. Subsequently this notice being served upon Mr. Head, the order sect. 13 of the Act, sent the case, by Letters, * to this Court. The defendant appeared to the

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Head.*

purpose aforesaid, will issue accordingly, at or after the 14 days from the day of your being served with these even under our hand this 11th day of October, in the year 1841. HENRY EXETER."

owing is copy of the Letters of Request:—

Letters of
Request.

By Divine Permission, Bishop of Exeter, to the Right Sir Herbert Jenner, Knight, Doctor of Laws, Official Primate of the Arches Court of Canterbury, lawfully constituted, your some other competent judge in this behalf. Whereas, by an Act of Parliament passed in the Session of Parliament holden in the fourth years of the reign of her present Majesty Queen Victoria, intitled 'An Act for better enforcing Church Discipline,' it is enacted, 'That in every case of any clerk in holy orders of the United Kingdom of Great Britain and Ireland, who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist any report as having offended against the said laws, it shall be the duty of the Bishop of the diocese within which the offence is alleged to have been committed, on the application of any person claiming thereof, or, if he shall think fit, of his own mere motion, to issue a Commission under his hand and seal to five persons, one of whom shall be his Vicar-General, or an Archdeacon, or Rural Dean of the diocese, for the purpose of making inquiry as to the truth of the charge or report.' And whereas it is in and by the said Act enacted, 'That it shall be lawful for the Bishop of any diocese in which any such clerk shall hold any preferment, or if he shall be otherwise charged, then for the Bishop of the diocese within which the offence is alleged to have been committed, in any case, if he shall be satisfied in the first instance, or after the Commissioners shall have reported that there is sufficient *prima facie* ground for instituting proceedings, to issue a Commission before the filing of the Articles, but not afterwards, to be taken by Letters of Request to the Court of Appeal of the Archbishops, to be heard and determined according to the law and practice of the said Court.' And whereas the Rev. Henry Erskine Head, a Minister in holy orders of the said United Church of England and Ireland, of the rectory and parish church of Feniton, in the county of Devon, diocese of Exeter, and province of Canterbury, is charged, within our said diocese of Exeter, offended against the said laws ecclesiastical, by having written and published, or caused to be printed, in a certain newspaper called the *Western Times*, dated

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Citation from this Court under protest to its jurisdiction, on the ground that the notice was a subsisting notice under sect. 3, and that the Bishop had not sent the case by Letters of Request to this Court in the manner and form directed by the Statute. He further alleged, that it did not appear, either by the Citation or the Letters of Request, on whose application, or at whose mere motion, this cause was in the first instance commenced, or at the first begun, or was originally proceeded in, nor by whom nor on whose application or complaint he was in the first instance charged, nor at whose request nor on whose mere motion the Letters of Request were issued; nor did it therein sufficiently appear that the provisions of the Statute had been duly complied with.

'Exeter, Saturday, August 21, 1841,' a letter, entitled 'A View of the Duplicity of the present System of Episcopal Ministration, in a Letter addressed to the Parishioners of Feniton, Devon, occasioned by the Bishop of Exeter's Circular on Confirmation, by Henry Erskine Head, A.M., Rector of Feniton, Devon,' in which letter it is openly affirmed and maintained that the 'Catechism,' the 'Order of Baptism,' and the 'Order of Confirmation,' in the Book of Common Prayer, contain erroneous and strange doctrine, and wherein are also openly affirmed and maintained other positions in derogation and depraving of the said Book of Common Prayer, contrary to the Statutes and to the Constitution and Canons Ecclesiastical of the realm, and against the peace and unity of the Church: Now, therefore, We, the said Bishop of Exeter, do hereby request you, the said Right Honourable Sir Herbert Jenner, Knight, Doctor of Laws, Official Principal of the Arches Court of Canterbury, lawfully constituted, your Surrogate, or some other competent judge in this behalf, to issue a citation or decree under seal of the said Court, calling upon the said Henry Erskine Head, clerk, to appear at a certain time and place, therein to be specified, then and there to answer to certain articles, heads, positions, or interrogatories, touching and concerning his soul's health, and the lawful correction and reformation of his manners and excesses, and more especially for having written and published, or caused to be published, the letter aforesaid, in manner aforesaid, to be administered to him at the voluntary promotion of Ralph Sanders, of the city of Exeter, gentleman, and to hear and determine the said cause according to the law and practice of the said Court. Is witness whereof, We have hereunto set our hand and seal this 9th day of November, in the year of our Lord one thousand eight hundred and forty-one, and in the eleventh year of our consecration.

"H. EXETER. (L.S.)

"Signed, sealed, and delivered in the presence of

"EDW. TOLLER, Jun."

The protest came on for argument on the third session of Hilary Term, 1842. JUNE 15.

Sir John Dodson, Q.A., in support of the protest. This SANDERS v.
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is a proceeding under the Statute, and if I shew that the proceedings are not in conformity with the Statute, the party cited must be dismissed. The 23rd sect. enacts that no criminal proceeding shall be instituted against a clerk of the Church of England for any ecclesiastical offence in any Ecclesiastical Court otherwise than therein-before enacted or provided. The mode of proceeding directed by the 3rd section is as follows: That where a clerk is charged with an ecclesiastical offence, or a scandal or evil report of his having offended exists, the Bishop of the diocese may, on the application of any party complaining, or of his own mere motion, issue a Commission to five persons, for the purpose of making inquiry as to the grounds of such charge or report. This part of the section is set forth in the Decree or Citation; but the other part is omitted: That notice of the intention to issue such Commission, containing an intimation of the nature of the offence, with the names and residence of the party on whose application such Commission was about to issue, be sent by the Bishop to the party accused, fourteen days at least before it shall issue. This notice was sent to Mr. Head, and that was the commencement of the cause, and is equivalent to a Citation in this Court, and not being revoked, the proceeding is now pending before the Bishop, who may convene the Commission when he pleases. How can Mr. Head be cited before this Court for an offence for which he may be called before the Commissioners? He may be required to appear at the same day and hour in any part of the Bishop of Exeter's diocese and in this Court. That the Citation is the commencement of the cause, if extracted, though not returned, was decided by the Judicial Committee in the case of *Ray v. Sherwood*.* It is contrary to the principle of the law that Mr. Head should be liable to be tried twice for the same offence. It is more proper, in such a case, involving a matter of controversial divinity, that

JAN. 29.

ARGUMENT.

* 1 Curt. 193.

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the Bishop should deal with it than a layman, though exercising the highest judicial functions. The 13th section provides that the Bishop may, "in the first instance, or after the Commissioners shall have reported that there is sufficient *prima facie* ground for instituting proceedings, and before the filing of the Articles, but not afterwards, send the case, by Letters of Request, to the Court of Appeal of the province." But if he elects to issue a Commission, he must go on till the Commissioners have reported.

Harding, D., on the same side.

Addams, D., against the protest. The notice was served on the party contrary to the intention of the Bishop, by a blunder of his agent. *Cui bono* this objection? If the Bishop issued a Commission, there is every probability that the Commissioners would report that there was a *prima facie* case, and then Letters of Request could bring the cause here in the course of four or five months, at further expense. The service of the notice was not a commencement of the proceedings; it merely announced the Bishop's intention to proceed. With respect to the objection, that the Letters of Request did not contain (as in ordinary cases) the name of the person promoting the cause in the first instance, the Statute does not require this; it prescribes no particular form. This is a case which it was proper that the Bishop should not take cognizance of.

Robinson, D., on the same side.

JUDGMENT

SIR H. JENNER FUST.—I do not feel any great difficulty in this case. Although there is no precedent, I see no reason, on principle, which should prevent the Bishop from withdrawing a notice so sent, and putting the proceeding in another shape, in conformity with the Act of Parliament.

It is clear that Letters of Request from bishops, under this Act, must vary from those which have hitherto come from chancellors of dioceses, as, in those cases, the bishops did not send the Letters: the Letters must be in a form adapted to the Act.

The protest is to the form and manner of the proceeding, and the first question is, what does the Statute require?

ee that, in order to give the Court jurisdiction, the provisions of the Statute must be complied with,— minutely or not it is unnecessary to inquire. There is no schedule in the Act for Letters of Request; I argued that they ought to contain not only the particulars which the Court is to inquire into, but all the particulars required in the notice from the Bishop of his intention to issue a Commission, and which he is enjoined to insert in the Letters of Request. I find no provision in the Act requiring that these particulars should be inserted in the Letters of Request; I am of opinion that it is not necessary to insert in the Letters of Request a schedule shewing that they must contain the particulars as the notice under another form of process requires, and unless it can be shewn that an injustice is done to the party by accepting Letters of Request in this manner, I cannot understand why he should have more information in the Letters of Request from the Bishop than he would have under the ordinary ecclesiastical form. It is true that the Act does contain a different machinery for Letters of Request for other purposes; but it does not require, nor can be construed to require, that the Letters of Request should contain the particulars which the Bishop is required to insert in the notice. By the Letters of Request, the party is required to state in a cause at the voluntary promotion of a particular person, according to the usual form of proceeding in such cases, so far as the Act has made no alteration. It is the duty of the Judge of an Ecclesiastical Court, under the old law, to only grant Letters of Request at the application of the party promoting the suit, and therefore it was in this case that it was at the special instance of that party that the cause was transferred from the forum in which it would have been originally instituted to the Court where it could be heard by way of appeal. But the 13th section of the Statute provides that the Bishop may, “if he think fit,” refer the cause up by Letters of Request to the Court of Appeal. That it is to be the act of the Bishop, and a matter for his consideration with him, whether he will entertain the suit in the first instance, or send it up in the first instance, or after the refusal of the Court of Arches, to which it might travel in the first instance, is sufficient. I am of opinion that the Letters of Request are sufficient.

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quest are in the form and manner required by the Act. They recite the provisions of the Act, whereby the Bishop is empowered, if he shall think fit, either in the first instance, or after the Commissioners shall have reported that there is sufficient *prima facie* ground for instituting the proceedings, and before the filing of the Articles, to send the case by Letters of Request to this Court of Appeal, to be there determined according to the law and practice of the Court. The Bishop has not issued any Commission, and he sends the case here. Now what is the law and practice of this Court? That the Articles should be administered at the voluntary promotion of a party. No alteration is made in this respect by the Act. The Letters of Request recite the offence of Mr. Head, and request this Court to take cognizance of it, and the Court accepted the Letters of Request, and decreed to proceed according to their tenor.

Name of party
not required.

One ground of protest is that the Letters of Request do not contain the name of the party on whose application or mere motion the proceeding first commenced by the issue of the notice; but it does not appear to me that this is required. The point relied on is, that the case is not sent to the Court, as required by the 13th section of the Act, in the first instance. It is said, with reference to the 23rd section, that the proceedings must be according to the provisions of this Statute; that the 13th section directs the time at which it is alone competent to the Bishop to send the case here, either in the first instance, or after the Commissioners have reported, and that the notice of the Bishop to Mr. Head, of his intention to proceed by issuing a Commission, binds the Bishop to carry it out to the full extent; that he cannot alter his mind; that he is bound to issue a Commission to inquire whether there be *prima facie* ground for a proceeding, and that it is equivalent to a Citation in these Courts, which was held, in *Ray v. Sherwood*, to be a sufficient commencement of a suit. The case of *Ray v. Sherwood* had reference only to a particular Act of Parliament, the question being whether the words "suit depending" were used in a popular sense, or to denote a *contestatio litis*, and it was considered that a suit was depending by the issue and

ice of the Citation—in short, that the words were used in popular sense. But I am not satisfied that the notice is equivalent to a Citation; it is a notice of an intention to proceed; it is no part of the proceeding. By the 4th section of the Act, the Commissioners are empowered to examine witnesses on oath, and for that purpose they may summon persons as witnesses, and notice is to be given to the accused by of the time and place of meeting seven days before. It would be a Citation before the Commissioners, and it would be a commencement of the proceedings analogous to a Citation before this Court: a notice of an intention to proceed is only necessary to give warning to the party to prepare to defend himself; it is a preliminary to the proceedings. Certainly, looking at the phraseology of the Act, if it had not been passed in a hurry, some of it would not have been suffered to remain, for it is clear that some words are used in different senses in different parts of the Act. For example: in the 13th section, the words “in the first instance” are used in a different sense from the same words in the 15th section, whereby any party who shall think himself aggrieved by the judgment pronounced “in the first instance” by the Court, or in the Court of Appeal, is allowed to appeal. Here, “in the first instance” cannot mean the notice, but it must mean the first hearing of the cause. What I understand by the words “in the first instance,” in the 13th section, is, that before the Commissioners have proceeded to inquire, the Bishop may send the case to the Court of Appeal; that it is not necessary for the Commission to inquire, but, before or after the inquiry, the Bishop may send the case here. It is not necessary for the Court to say that its opinion would be if the Commission had issued, and the Commissioners had proceeded to inquire, and during the inquiry the Bishop had sent the case up to this Court. But what I understand is, that the Bishop, before the Commission is issued, may send up the case here by Letters of Request, and that is the “first instance,” as I cannot consider the Notice a part of the proceedings; it is only a preliminary to the issue of the Commission, which is itself only a preliminary proceeding. I think the other sections bear out

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Notice no part
of proceedings.

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this interpretation. By the 16th section it is provided that the Bishop who shall have issued the Commission, or have heard the case, or have sent the case by Letters of Request to the Court of Appeal, shall not sit on the Judicial Committee on an appeal in that case. But there is nothing to prevent a Bishop who has sent a notice from sitting.

There is nothing, I think, in the observation on the propriety or impropriety of the case being sent up here by Letters of Request. I do not see how the party can be prejudiced on the ground of the notice being a valid and subsisting notice. It is so, and I may, perhaps, regret that it had not been withdrawn; but it is not to be supposed that this notice is hanging over the head of the party, or that it is the intention of the Bishop to proceed after sending the case to this Court.

Now I have determined that, in my opinion, it is not necessary that the Letters of Request should contain the particulars inserted in the notice; that the notice is not such a commencement of the proceedings as to bar the Bishop from sending the case to this Court, and that it is not necessary that the Letters of Request should state at whose application or mere motion the proceedings commenced; I think, if the Bishop sends up to this Court Letters of Request to entertain the suit, before the issue of the Commission, it is sufficient to satisfy the words "in the first instance." I think there is no difficulty in the case, and that the proceeding is a proper one. The protest must be overruled, and the party assigned to appear absolutely. I reserve the question of costs.

Protest over-
ruled.

From the foregoing sentence, the defendant (with permission of the Court) appealed to the Privy Council, where the following proceedings took place.

1842.
 Nov. 28.

ARGUMENT
 before the Judi-
 cial Committee,
 P. C.

Sir John Dodson, Q. A., for the Appellant.—By the 3rd and 13th sections of the Act, the Bishop has the option of issuing a Commission, or of proceeding in the old form, by sending the case to the Court of the Archbishop; but he could not do both; he must make his election, and by the

section, he is to make his election "in the first instance." After sending a notice to the party of his intention to issue a Commission, the Bishop is not at liberty to bring the case to the Archbishop's Court until "after the Commissioners have reported that there is sufficient *prima facie* ground for instituting proceedings." In the present case the Bishop must be taken, by his notice, to have intended to proceed by a Commission, and if so, he could not bring the case to the Arches Court until after the Commissioners had made their report, and consequently his Letters of Request could give that Court no jurisdiction, having been issued improperly in point of time. [VICE-CHANCELLOR BURNES.—You assume that the notice is subsisting, and that the Bishop may still issue a Commission; but is that conceded by the other side?] It is plain from the Act that the Bishop might still act upon the notice, if he thought fit: he could do nothing to deprive himself of the power of issuing a Commission. Another ground is, that the Bishop might have acted upon the application of a party complaining, or of his own mere motion; but he could not do both. [DR. LINGARD.—That is the real difficulty. It is quite plain that the Bishop may promote the suit himself, as formerly, or he may be a separate promoter; and it is also plain that the Bishop may, if he please, devolve the suit upon the Arches Court; but the difficulty is, that the Letters of Request being in the name of the Bishop, proceeding in the same instance as if the Bishop had been the promoter, instead of the promoters, at the end there is the name of Sanders as the promoter.] Yes; you have one party at the commencement of the suit, the promoter, and then it is devolved upon another. [SIR J. BURNES, Q. C., on the same side.—Though there are cases in which a notice is not a process, still it appears by the Act of Parliament that this notice is intended to operate as a citation; and in point of fact it does so. It is in the nature of a notice of trial. [VICE-CHANCELLOR BRUCE.—I say, by giving this notice, the Bishop has made a conclusive election?] So far conclusive, that he cannot send the case to the Arches Court until after the Commissioners have reported. Again; the Act gives the Bishop the power

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of proceeding in two cases only, where he proceeds upon the application of a party complaining, or of his own mere motion. [THE BISHOP OF LONDON.—Am I to understand that, if the Bishop had been originally a voluntary promoter of the suit, he could not then have referred it to the Arches Court by Letters of Request?] He may do so in the first instance; there may be circumstances which would induce the Bishop to think that the matter may be more fairly inquired into out of his own diocese; but it is important that it should appear upon the face of the proceedings, whether the Bishop sends up the cause of his own mere motion, or at the instance of a party complaining; because, however desirable it may be that some superintending control should be exercised over the opinions of the inferior clergy, there is also a very wholesome control exercised by public opinion in respect of prosecutions, such as this, for religious opinions. I am quite sure, speaking in the presence of one of the right reverend prelates of the church, that it is not consistent with the dignity of their high ecclesiastical functions that they should be the promoters of suits of this kind. I will put it hypothetically, that the gentleman whose name is now used as the promoter of the suit is the Bishop of Exeter's secretary. [Addams.—You may take it as the fact.] Then I ask whether the Bishop is promoting the suit with the moral responsibility which ought to belong to a prosecution of this nature? [THE BISHOP OF LONDON.—You are aware that, under the old law, the Bishop could proceed in no other way than in the name of his secretary?] Yes, but it was then understood that the Bishop proceeded of his own mere motion; but in this case, there is the singular anomaly that the Bishop commences the Letters of Request as if he were the party setting the proceeding in motion, and then he suddenly transfers it to Mr. Sanders. [V. C. BRUCE.—Suppose the true construction of the Letters of Request to be, that Sanders originally gave the information and set the Bishop in motion, and then the Bishop thought fit, of his own mere motion, to send Letters of Request to the Dean of the Arches, in order that the cause might be disposed of in the Arches

—t, Sanders being still minded to be the promoter of suit, and continuing to be so ; would that be regular or not ?] I apprehend it would. [V. C. BRUCE.—Then the question is, whether these Letters of Request, according to their true and fair construction, do not imply that ?]

Edams, D., for the Respondent.—The 3rd and 13th sections of the Act will not bear the construction put upon

— “ In the first instance,” means, at any time before giving a Commission ; and in this case, no Commission had been issued. [LORD CAMPBELL.—Then you treat the notice as a nullity ?] It is essential to issuing a Commission ;

if not acted upon, it is a nullity. [DR. LUSHINGTON.—The proceeding stands upon the same footing as if no Commission had issued ? The notice is superseded by the Letters of Request, and that puts the matter in the same situation as if the notice had never issued ?] Yes ; the intention is,

that the Bishop shall not even issue a Commission of Inquiry until he give notice, and if he finds there is a *prima facie*

case then he may send it to the Court of Arches ; but after the issuing of a Commission, it is not in his power to send it further until after the Commissioners have reported. [LORD CAMPBELL.—You say, the notice is to go for nothing ; but

it is a step in the cause, you cannot say the Letters of Request issued “ in the first instance.”] It is merely notwithstanding an intention on the part of the Bishop at that time to issue a Commission, which afterwards he may not think proper to act upon. [THE BISHOP OF LONDON.—The Bishop in the first instance may have heard rumours concerning a

man which may induce him to send a notice to the Bishop of his intention to issue a Commission, and he afterwards receive information which may give it so strong a complexion, as to induce him to send it to the Court of Arches.] Certainly. [DR. LUSHINGTON.—The question is, whether he should not do something to supersede what he has done by giving the notice, and then begin *de novo* ?]

I contend that, until the issuing of a Commission, the Bishop might send the cause to the Arches Court, and that the Letters of Request operated as a *supersedeas* of the Commission. As to the other objection, it sufficiently appears

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upon the face of the proceedings that the Bishop had set the suit in motion upon the application of Sanders. The proceedings in this respect were in the same form as before the Act passed, and the 13th section directed that the cause might be sent to the Court of Appeal of the province, "to be there heard and determined according to the law and practice of such Court."

Cur. adv. vult. LORD CAMPBELL.—Their Lordships will take time to consider their Judgment.

Dec. 9.

JUDGMENT.

Form of the
Letters suffi-
cient.

LORD CAMPBELL.—The first objection is, that the Letters of Request are *ex facie* defective and void, on the ground that they do not shew on whose application the cause was commenced, or at whose request they were granted. Their Lordships, however, are of opinion that the Letters of Request are sufficient. The Statute does not require that they should be in any given form, and they do disclose that the cause was "at the voluntary promotion of Ralph Sanders, of the city of Exeter, gentleman;" and the Bishop having authority by the Statute to issue Letters of Request in this proceeding, if he shall think fit, there can be no necessity for stating, according to the old form, at whose request they were granted. And, for the reasons hereafter to be mentioned, their Lordships are of opinion that the Letters of Request need not make any reference to the notice served by the Bishop.

The second objection, of a graver nature, is that, at the time when the Letters of Request were issued, the Bishop had no authority to issue them, as he had made his election to proceed by a Commission of Inquiry in his own diocese. The 3rd section of the Statute gives power to the Bishop, on a clergyman being charged with any ecclesiastical offence, or concerning whom there may exist scandal or evil report, to issue a Commission of Inquiry as to the grounds of such charge or report, "provided always that notice of the intention to issue such Commission, under the hand of the Bishop, containing an intimation of the nature of the offence, together with the names, addition, and residence of the party on whose application or motion such Commission should be

t to issue, shall be sent by the Bishop to the party ac-
l fourteen days at least before such Commission shall
." On the 11th October, 1841, the defendant was in
form served with a notice, under the hand of the Bishop
xeter, dated on the same day. On the 9th November
wing, without any thing being done to countermand or
rsede the notice, the Letters of Request issued, by which
defendant was to be prosecuted in the Arches Court. It
ntended that this was contrary to the 13th section of
Statute, for that, by reason of the notice, the Letters of
est were not sent "in the first instance," within the
ing of the Statute: and if this were so, they would
inly be void, as their validity rests entirely upon the
te. But, after much doubt and hesitation, their Lord-
s have arrived at the conclusion, that the notice may be
ely disregarded, and that, within the meaning of the
te, the Letters of Request were sent "in the first in-
e." The notice, although required by the Statute, only
ates the intention to institute proceedings; it cannot be
idered the commencement of the suit, and therefore,
a the Letters of Request issued, there was no suit pend-

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The Letters of Request may issue in the first instance,
ter the report of the Commissioners that there is a *prima*
case against the accused; the Legislature probably
it "either with or without a previous inquiry instituted
he Bishop," understanding that, without a previous in-
y, the cause would come in the first instance before the
es Court. Although the notice was served, there were
eans of compelling the Bishop to issue a Commission,
it seems to have been admitted that if, upon further con-
ation, his Lordship thought it were expedient to send
ase at once to the Arches Court, he might have done so
uperseding the notice. The Letters of Request may
onsidered as such *supersedeas*.

The Letters
were sent "in
the first in-
stance."

has been argued before us, that this construction of the
might subject a clergyman to vexatious proceedings,
before the Commissioners and the Arches Court; but
annot suppose that a change of intention as to the mode
proceeding can ever take place except for the interests of

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Head.*Decree of the
Court below
affirmed, with-
out costs; and
cause remitted.

justice and the good of the Church, and it is difficult to conceive how a party can be prejudiced by the service of a notice of the intention to issue a Commission. If the Commission had issued, or the defendant had been cited to appear under it, then their Lordships would have thought the Letters of Request could not issue until the Commissioners had made their report. The decree of the Court below will, therefore, be affirmed, but without costs.

There was a further prayer, that the cause would be retained; but their Lordships are of opinion that it ought to be remitted to the Arches Court. This is a Court of Appeal of the last resort, and their Lordships think such a Court ought not to decide a cause of this nature in the first instance; that they ought to have the benefit of a discussion and decision in the Court below, and that there ought not to be an original judgment in this place, from which there can be no appeal.*

1843.

Jan. 11.

The Articles
admitted.

On the remission of the cause to the Arches Court, Articles were prayed and brought in; they were subsequently admitted without opposition, a negative issue being given by Mr. Head, who made admissions which rendered it unnecessary to examine witnesses, and reduced the question to one of law—namely, whether the publication amounted to an offence cognizable by the Ecclesiastical Court. Amongst the passages set forth in the Articles, as contained in the letter published in the *Western Times*, are the following:—

There spake the spirit of the present system of episcopal ministration. All the Bishops, it is true, may not be quite so incautious as the Bishop of Exeter; but, inasmuch as they connive at and continue the use of the Catechism, and Baptismal and Confirmation Services, in their present state, I do not hesitate to aver that they act upon a system by which the episcopal order is exalted under false pretences, and at the expense of the doctrines of the Bible.

* The Committee consisted of Lord Campbell; Sir J. Knight Bruce, V.C.; Mr. Justice Erskine; Dr. Lushington, and the Bishop of London.

As reformation in this respect is not hopeless, and as I also am obliged by my ordination vows, as a minister of the Church of England, to banish and drive away all erroneous doctrine, I do hereby decline and refuse to give any countenance whatever to the use of Confirmation as it is now used by their Lordships the Bishops, and, instead of recommending, in compliance with the Episcopal Circular, the perusal and re-perusal of that Service, to young persons of this parish, I warn them all—young, old, middle-aged—to beware, in the name of God, of the erroneous and strange doctrine which it contains.

It is also a fact, that the Prayer-Book sins against itself. Some parts of it are at variance with other parts. The 4th, 6th, 8th, and 11th Canons are repugnant to the 1st and 3rd Ordination Vows. Some of the dogmas in the Catechism, Confirmation and Baptismal Services, are utterly inconsistent with the doctrines contained in the 11th, 12th, 13th, and 17th Articles.

If their Lordships wish to satisfy the public that their exaltation is just and right, let their Lordships, instead of teaching the erroneous doctrine in the Church Service, banish and drive it away; instead of bending the Bible to the obliquities of the Prayer-Book, let them make, or endeavour to make, this Prayer-Book consistent with the Bible and with itself; instead of reversing the Apostle's exhortation, let them "abhor that which is evil" in the Prayer-Book, and "cleave to that which is good" in it.

Addams, D., for the promoter.—The Articles having been admitted, and the facts being admitted or not being denied, the question is, in fact, conceded, and the Court may pronounce the penalty incurred. It is a matter of public notoriety that, at the present day, there is a strong disposition to deny the doctrine of baptismal regeneration. The defendant thought proper to discuss this point and the others, soberly, at a proper time and in a proper place, but in a public newspaper—the last place where such a controversy should be carried on—accompanied by matter very offensive to the diocesan, as if the Bishop had any right to alter or change the offices in the Book of Common Prayer. Of the Articles of 1603, the 4th forbids the affirming that the form of worship in the Book of Common Prayer and administration of Sacraments contains any thing repugnant to the scriptures, and the 36th requires the subscription of such oaths to be made ministers to three Articles, one of which is,

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"that the Book of Common Prayer containeth in it nothing contrary to the Word of God, and that it may be lawfully so used, and that the subscriber himself will use the form in the said Book prescribed." By the Act of Uniformity of Charles 2,* the Statutes respecting the Book of Common Prayer are re-enacted. These Statutes, although they annexed a temporal penalty to offences, did not take away the jurisdiction of the Ecclesiastical Court. Rolle, *Abr.*† *Cas-drey's case.*‡ Has the defendant used the office of baptism? If not, he is unfit to be the rector of a parish. The Court is bound to pronounce the extreme penalty of deprivation, though this gentleman should spare the Court the office of pronouncing sentence, by withdrawing from a church whose offices he cannot conscientiously administer.

Robinson, D., on the same side.

Sir John Dodson, Q.A., for Mr. Head.—The fact of having published the document, and its contents, are admitted; but we do not admit the inferences of law deduced therefrom in the Articles. I am at a loss to know under what laws, canons, constitutions, and statutes of the realm the offence is charged. I contend that Mr. Head has offended no law. This is a criminal proceeding, and the charge should be specifically pleaded. *The King's Proctor v. Stone.*§ *Martin v. Escott.*|| As to the question of regeneration by baptism, respecting which, Dr. Addams says, a controversy exists, I do not profess to be able to discuss matters of that kind. The question is, not whether Mr. Head, in common with others of the clergy, entertains certain opinions upon this point, but whether he has offended the law. I will not go into this theological question, or discuss the merits of the publication. [PER CURIAM. Do you mean to waive that question?] No; I do not mean to discuss the doctrine of regeneration. [PER CURIAM. The question is, whether the publication is in derogation and depraving of the Book of Common Prayer; I do not wish you to discuss theological points at all.] I apply myself to the law. The 4th Canon,

* 13 & 14 Car. 2, c. 4, § 24.

† 5 Co. 8, 40.

|| 2 Curt. 692.

† 2 Vol. 222.

§ 1 Hagg. C. R. 484.

ing impugners of the established worship, is not
 the clergy, but against the laity. The date of this
 is 1603, and our Book of Common Prayer was not in
 force till 1662. The 36th Canon is relied upon, which
 is the subscription of the clergy to certain articles;
 it is not charged against Mr. Head that he has not sub-
 scribed. The Canons of 1603 have nothing to do with the
 present Book of Common Prayer. But, it is said, the Act of
 Uniformity supplies what is wanting. The Acts of Edward
 and of Elizabeth,† which the Act of Uniformity re-
 lated to and re-enacted, prohibited the “preaching, de-
 bating, and speaking any thing in the derogation or de-
 basing of” the Book of Common Prayer; but they say
 nothing of printing and publishing. “Declaring,” in its
 ordinary sense, means “speaking openly.” Moreover, the
 Statutes did not annex the punishment of deprivation to the
 offence; but provided that, if a party had once so
 offended, and “afterwards” should offend again, he might be
 deprived. It is said that the jurisdiction of the Ordinary is
 founded, on the authority of *Caudrey's Case*. But Caudrey
 committed two offences, preaching against the Book of
 Common Prayer, and refusing to use it,—a case different
 from the present.

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Mr. Garding, D., on the same side, cited, in addition: *New-
 y v. Goodwin*; ‡ *Fletcher v. Sondes*; § *Evans v. Stevens*; ||
Sell, Crim. Law; ¶ *Hallam, Const. Hist.*; ** *Bishop of
 Chester's Charge*. ††

PER CURIAM. I must have an opportunity of looking *Cur. adv. vult.*
 into the cases. It is an important question whether, on the
 one hand, a clergyman is at liberty to “write” any thing in
 derogation of the Book of Common Prayer; and, on the
 other, whether he is liable to deprivation for doing so.
 In *J. Dodson* cited from the Printed Catalogue the case May 11.
Havard v. Evanson, in 1775, a proceeding against a

* 2 & 3 Edw. 6, c. 1. 5 & 6 Edw. 6, c. 1.

† 1 Eliz. c. 2. 13 Eliz. c. 12.

§ 3 Bing. 560.

¶ P. 205.

†† In 1841, p. 16.

‡ 1 Phill. 282.

|| 4 T. R. 224.

** 1 Vol. 233.

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JUDGMENT.

clergyman for writing and publishing doctrines repugnant to those of the Church of England.*

SIR H. JENNER FUST.—Mr. Head has admitted the fact that he is a minister in holy orders of the Church of England, and rector of the parish church of Feniton; he admits that he is the author and publisher, or the cause of publishing, the letter in question; but he does not admit that it contains doctrines or positions repugnant to, or derogation or depraving of, the Book of Common Prayer; that it openly affirms and maintains that the Catechism of Baptism, and Order of Confirmation contained therein contain erroneous and strange doctrine: that is a point to be tried with respect to the words of the letter. He admits that there does exist a scandal and evil report of him, as the author and publisher of the letter, having thereby offended against the ecclesiastical law. When the Articles were brought in, an intimation was given that they would be opposed; but the opposition was withdrawn, and it would seem *prima facie* to have been intended to admit the Articles, and to contend that they did not contain a charge that could render Mr. Head liable to ecclesiastical censure. But at the time the case was argued, it was contended by the Counsel for Mr. Head, that he was not bound to raise his objections at the admission of the Articles, but was at liberty to take objections at any time, and I am inclined to think that it was not obligatory upon him to

* The defendant in the case referred to was Vicar of Tewkesbury; the voluntary promotor of the suit was a parishioner. The charges comprised the following: omitting passages in the service; reading the Nicene Creed in an indecent and irreverent manner, and sometimes omitting it; making declarations against the doctrines of the Church of England, and writing, publishing, and setting forth in pamphlets, doctrines repugnant to that of the Trinity. The cause commenced in the Consistory Court of Gloucester, in January, 1775, where the defendant's petition was rejected. He appealed to the Arches Court, which pronounced for the appeal. It would appear that there was another appeal from a grievance, and that the case went to the Delegates. Ultimately, the promotor of the suit declined to proceed further, and the defendant was dismissed, the promotor being condemned in the costs.

them at the admission of the Articles. It becomes
ary, therefore, to consider the nature of the ob-
is.

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first is, that the Articles contain no specific allegation
law on which the proceeding is founded, so that it
difficult for the party to know how to address himself to
question of law, and cases were cited to shew that,
clergymen have been charged with offences against
doctrines of the Church, the Articles have set forth the
ular Statutes creating the offence and affixing the
ty. And where the proceeding is under a particular
te, for a particular offence, for which there is a parti-
penalty,—in that case, it is necessary to set forth the
pecifically: as in *Newberry v. Goodwin*; *Cox v. Good-*
Martin v. Escott; and *The King's Proctor v. Stone*.

Objection that
the law is not
alleged:

objection has not been taken for the first time in the
ent case; it has been frequently taken, and as fre-
quently overruled. It has been always held that, where the
ence comes under the general law, it is not necessary to
and the particular Statute or Canon under which the pro-
ceeding is instituted. This question is fully disposed of in
the case of *Wilson v. McMath*.† So also in the cases of not sustained.
Sander v. Davies,‡ and *Dave v. Williams*.§ I have, therefore,
no doubt that the law is sufficiently pleaded; and the ques-
tion is, whether the Articles set forth an ecclesiastical
offence.

It has been argued by the Counsel for Mr. Head, that he
has laboured under a considerable degree of hardship in not
knowing the law upon which the proceeding is founded. I
can hardly think that there is any serious hardship in this,
as he had an opportunity of knowing this at the time the
Articles were admitted, by objecting to their admission, on
the ground that they did not state the law. I admit that he
was not bound to take the objection in the first instance, and
that he is entitled to every advantage which the law allows
him; but there is not any hardship in the case, the proceed-

* 2 Hagg. C. R. 138.

† 3 Phill. 61.

‡ 1 Add. 291.

§ 2 Add. 130.

JUNE 15. ing being under the general law, and not confined to any particular Statute.

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Head.*

Now the proceeding is against Mr. Head as a beneficed clergyman of the Church of England, and nothing can be more clear than that, under the general ecclesiastical law *universo consensu*, the power of the Ordinary over the clergy of the diocese, and of correcting them, is established and exercised by proceedings in the Ecclesiastical Court. Private admonition may be in some cases sufficient; but when it is necessary to take proceedings, they must be by Article against a clergyman when acting contrary to his duty as minister of the Church of England and as a beneficed clergyman.

Nature of the charges.

This being a proceeding by the Ordinary against a clergyman of his diocese, it is necessary to consider the nature of the charges, and it is quite impossible for any one to read the charges without perceiving that they do contain matter in derogation and depraving of the Book of Common Prayer, as established by the Act of Uniformity, 13 and 14 Car. 2. Neither of the learned Counsel for Mr. Head would venture to contest this point. The title of the letter is "A View of the Duplicity of the present System of Episcopal Ministration, in a Letter addressed to the Parishioners of Feniton, Devon, occasioned by the Bishop of Exeter's Circular on Confirmation." It is no part of the duty of the Court to consider whether the doctrines contained in the Book of Common Prayer are erroneous or not; the law has declared that they are the doctrines of the English Church, and the only question is, whether the letter does or does not contain what is alleged against Mr. Head. In the fourth paragraph he says:—

It becomes my duty to state to you, that I have received a letter (a printed circular) from the Bishop of Exeter, requesting me to give notice of his Lordship's intention to confirm such young persons of this parish as shall be duly prepared: in short, I am called upon to address you on the subject of Confirmation—an equivocal word, pregnant with that necessary evil, controversy. Three years ago, the children of this parish did attend the Confirmation. On that occasion, the exclusive object of episcopal in-

quiry was, "Have these children been instructed in the sacramental parts of the Catechism?" A negative reply was given; and the Rector of the parish was publicly censured for having omitted to teach the erroneous and strange doctrine which the Catechism contains.

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Head.*

Now, to go no further, here it is affirmed that the Catechism contains "erroneous and strange doctrine," and not only that, but it is avowed by Mr. Head, that he had written this letter in consequence of the Circular of the Bishop of Exeter, requesting him to give notice of his lordship's intention to confirm such young persons of the parish as should be duly prepared. I find it very difficult to say that this is not an ecclesiastical offence; that the publication of such a letter, in consequence of the Bishop's Circular, does not render Mr. Head amenable to ecclesiastical jurisdiction, for he was enjoined to the performance of a duty which he is called upon to perform by the Canons of the Church and by the oath of canonical obedience to the Ordinary, which he took at the time of ordination, and of admission to the benefice. What does the 61st Canon require?

Every minister, that hath cure of souls, for the better accomplishing of the orders prescribed in the Book of Common Prayer concerning Confirmation, shall take especial care that none shall be presented to the Bishop, for him to lay his hands upon, but such as can render an account of their faith, according to the Catechism in the said Book contained: and when the Bishop shall assign any time for the performance of that part of his duty, every such minister shall use his best endeavour to prepare and make able, and likewise to procure as many as he can to be brought, and by the Bishop to be confirmed.

Why, here is an express Canon for the conduct of a minister of the Church of England, who shall have received an intimation from the Bishop of his diocese that the rite of confirmation would be administered to the children of the parish, to prepare them for duly receiving the rite, and Mr. Head states in his letter, that it was written and addressed to his parishioners in consequence of his being required by the Bishop to prepare and instruct the children of the parish for the due reception of the rite, which he was bound to do,

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as minister of the parish : so that this was a direct breach of canonical obedience and of his duty, as enjoined by the Canon. I am aware that this is not the offence imputed to Mr. Head; but it is a circumstance in the case, and an aggravation of the offence. The letter goes on:—

There spake the spirit of the present system of episcopal ministration. All the Bishops, it is true, may not be quite so incautious as the Bishop of Exeter; but, inasmuch as they connive at and continue the use of the Catechism and Baptismal and Confirmation Services in their present state, I do not hesitate to aver that they act upon a system by which the episcopal order is exalted under false pretences, and at the expense of the doctrines of the Bible.

Nothing can be more offensive than such expressions addressed to his parishioners by a minister of a parish, speaking of his diocesan. The letter speaks of the "errors of the baptismal service," and proceeds:—

These entreaties, it is fair to admit, are made in a tone of great urbanity; the letter contains some just observations; and the whole announcement would be quite unexceptionable, if those Church Services, to which his Lordship refers both you and myself, were free from error. But the letter covertly insinuates that those Church Services contain nothing but sound doctrine; indeed, the whole communication is almost entirely founded on this assumption, which assumption is not consistent with truth. I do not mean that his Lordship intends to insinuate a greater proportion of falsehood than is usually found in episcopal circulars: far be it from me to attribute a single grain of duplicity to the Bishop of Exeter which does not attach itself to all his right reverend brethren. All their Lordships promise at their ordination to be "ready to banish and drive away all erroneous and strange doctrine:" but, on the other hand, they do not scruple to vex us with the erroneous and strange doctrine of the Confirmation Service.

As reformation in this respect is not hopeless, and as I also am pledged by my ordination vows, as a minister of the Church of England, to banish and drive away all erroneous doctrine, I do hereby decline and refuse to give any countenance whatever to the office of Confirmation as it is now used by their Lordships the Bishops; and, instead of recommending, in compliance with the Episcopal Circular, the perusal and re-perusal of that service, to the young persons of this parish, I warn them all—young, old, and

l—to beware, in the name of God, of the erroneous and trine which it contains.

a fact that the Prayer-Book sins against itself. Some re at variance with other parts. The 4th, 6th, 8th, and s are repugnant to the 1st and 3rd Ordination-Vows. ie dogmas in the Catechism, Confirmation, and Bap- ces, are utterly inconsistent with the doctrines con- e 11th, 12th, 13th, and 17th Articles.

ordships wish to satisfy the public that their exaltation right, let their Lordships, instead of teaching the erro- ine in the Church Service, banish and drive it away ; ending the Bible to the obliquities of the Prayer-Book, ke, or endeavour to make, this Prayer-Book consistent ble and with itself; instead of reversing the Apostle's em “abhor that which is evil” in the Prayer-Book, e to that which is good” in it.

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assages contain a direct averment that the Cate- Baptismal and Confirmation services, do contain and strange doctrine, and nothing can be more a matter and style than this address from an and beneficed clergyman of the Church to his s, reflecting upon his diocesan and upon the the Church generally. The passages contain a gation and depraving of the Book of Common

The letter contains a direct averment that the Prayer-Book contains erroneous and strange doctrine, and a derogation and depraving thereof.

being inconsistent with itself and with the Arti- Church. Therefore, from the words of the letter charge, of advisedly maintaining and affirming atechism and Baptismal and Confirmation services . strange and erroneous doctrine, is fully made his letter Mr. Head avows himself the author and and I think it is impossible to read a document ive in matter and style, considering the person t is written, the persons to whom it is addressed, oject of the letter; and beyond all doubt it does tter which renders the writer, who is a clergy- y orders of the Church of England, amenable to tion of the Ordinary, exercised by the Ecclesiasti-

The writer amenable to ecclesiastical jurisdiction.

ence is, therefore, a very grave and serious one, by a clergyman of the Church of England, who

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is bound at his admission and ordination to subscribe certain articles, without which he would not be admitted to the ministry. No person can be admitted to the ministry till he has subscribed certain articles set forth in the Canon, one of which (the 3rd) is as follows: "The Book of Common Prayer, and of ordering of bishops, and deacons, containeth in it nothing contrary to the Word of God, and that it may lawfully so be used; and that himself will use the form in the said Book prescribed for public prayer and administration of the sacraments, and none other." These articles he is required to subscribe in the following form: "I do willingly and *ex animo* subscribe to these three articles above mentioned, and to all things that are contained in them:" so that Mr. Head has *ex animo* declared that the Book of Common Prayer containeth in it nothing contrary to the Word of God," and has subscribed "to all things contained in it."

It has been argued that the Canons of 1603 refer to the Book of Common Prayer now established, but to that established by the Statute of Elizabeth; but that Statute has been re-enacted by the present Act of Uniformity, and 14 Car. 2; and I have not heard it contended that the Canons are not binding upon the Clergy. I am, therefore, clearly of opinion, that Mr. Head cannot shelter himself under the plea that the Canons refer to the Book of Common Prayer formerly established, and not to that established by the present Act of Uniformity.

But the 61st Canon, which requires subscription to certain articles (one relating to the Book of Common Prayer) before a person can be admitted into holy orders, is confirmed by the Stat. 13 and 14 Car. 2, c. 4, which enacts that, before a minister can take possession of any ecclesiastical benefice or promotion, he shall subscribe the following declaration: "I do declare that I will conform to the Liturgy of the Church of England, as it is now by law established." This declaration is to be subscribed before the Archbishop, Bishop, or Ordinary of the diocese,* on pain

* Or before the Vicar-General, Chancellor, or Commissary. 1502, c. 6, § 5.

forfeiting, on failure, the promotion, and of being, *ipso facto*, deprived thereof, "and the same shall be void, as if a person so failing were naturally dead." And by the said Statute, it is further enacted, that every person presented to any ecclesiastical benefice or promotion shall, in place of public worship belonging to the same, within three months of his taking possession, read publicly the morning and evening prayers, according to the Book of Common Prayer, and publicly, before the congregation, declare his "unfeigned assent and consent to all and every thing contained and prescribed in and by the said Book," on pain of being, on neglect or refusal, *ipso facto*, deprived of the benefice or promotion. The law, therefore, to prevent schism and to "settle the peace of the Church," imposes on every minister presented to a benefice the necessity of conforming to the Liturgy and declaring his "unfeigned assent and consent to all and every thing" contained in the Book of Common Prayer; and can it be contended that Mr. Sanders, after subscribing to this declaration, is at liberty to publish, in writing, any thing impugning the Liturgy, or in derogation or depraving of the Book of Common Prayer, to which he had so subscribed? This would be a monstrous position.

It has been said that, by the Statute of Elizabeth, the power is limited to "declaring or speaking" any thing derogatory to the Book of Common Prayer; but, as this is a proceeding under any particular Statute, but under general ecclesiastical law, by which a minister of the Church of England is bound to conform to the Book of Common Prayer, established by competent authority, it is necessary to enter upon a consideration of this objection.

Can it be denied that the Ordinary has the power of correcting the clergy in matters of conduct and demeanour, as to their conversation, and their published opinions respecting the doctrines contained in the Liturgy, and the mode of administering the rites of the Church? Can it be contended that such law is at variance with the Act of Uniformity? The cases referred to, before that Statute, are distinguished from the present case. *Caudrey's Case*, in 5

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Coke, was a proceeding against a clergyman for preaching, as well as speaking, against the Book of Common Prayer. In the case, as reported in Rolle's *Abridgment*, there is a direct and positive recognition of the right of the Ecclesiastical Court to punish, by ecclesiastical censures, for depravation and derogation of the Book of Common Prayer.

And punishable under the general ecclesiastical law.

Then can the Court doubt that Mr. Head has brought himself within the ecclesiastical jurisdiction, and made himself amenable to the authority of his diocesan, for a breach of his duty and of his vow of canonical obedience, by a publication in derogation and depraving of the Book of Common Prayer, and that he is punishable for the offence by a proceeding in the Ecclesiastical Court, and by ecclesiastical censure? I have no doubt whatever of the jurisdiction of the Court, and that Mr. Head has most undoubtedly brought himself within the power of the general ecclesiastical law. As little doubt should I have in holding that the writing and publishing this letter was a "declaring," within the Statute of Elizabeth, though I am not called upon to enter into that question. I have not any doubt that Mr. Head is punishable under the general ecclesiastical law for the act with which he is charged, namely, having written and published the letter of which he has avowed himself to be the author. I have, therefore, no hesitation in holding that the Articles are completely proved, and the question for the Court now to consider is, what punishment it shall impose for such an offence by a minister of the Church of England and a beneficed clergyman.

I have referred to the Statute by which a minister of the Church is required publicly to declare his unfeigned assent and consent to all that is contained in the Book of Common Prayer, before he can be admitted to the possession of a living, on failure of which he is *ipso facto* deprived of his benefice, and it would not be any harsh exercise of the power of the Court if it were to pronounce that Mr. Head had incurred the utmost extent of punishment which the Court is authorized to inflict, namely, deprivation; for if he could not have entered into the possession of his living without declaring his unfeigned assent and consent to all that is

stained in the Book of Common Prayer, he could hardly explain of being harshly treated if he were visited with the penalty attaching to his neglect or refusal of declaring such assent and consent, namely, deprivation of his benefice. But the Court is not inclined to go to the full extent of punishment, not from any thing which appears in extenuation of the offence committed by Mr. Head, in the manner in which he has expressed himself in the letter, for nothing can be more offensive in style or matter. But the Statute of Elizabeth specifies degrees of punishment, distinguishing between the first, second, and third offences,—assigning, for the first, forfeiture of the profits of the benefice for a year, and imprisonment for six months; for the second, imprisonment for a year, and forfeiture of the benefice; and for the third, imprisonment during life. This was a severe punishment; but as there was a distinction made between the first, second, and third offences, I think the justice of the case may be satisfied by suspension. I pronounce that the Articles are fully proved, and that Mr. Head, for the offence he has committed, be suspended for three years, *ab officio et a beneficio*, from the performance of service and the receipt of the emoluments of his living, from Sunday, 25th June, and also condemned in the costs of the proceeding,* and motioned to abstain from similar conduct in future, though I think the Court would have been justified in going to the full extent of deprivation.

Addams.—The Court will require a certificate before the suspension is taken off? Certificate.

PER CURIAM.—No; I do not think that necessary, as the party may be proceeded against again if he offends during the time of his suspension or afterwards.

Proctors:—*Toller*, for the promoter; *Wills*, for the defendant.

* On the first session of Mich. T. (November 2nd), the Court was moved to relieve the party from the costs of the protest, on the ground that these costs were not expressly mentioned in the sentence, and that the Judicial Committee did not give costs of the appeal on that point. The Court, however, rejected the motion, observing that the costs of the proceeding meant the costs generally of the whole proceedings, including the protest.

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Head.

Suspension for
three years, and
costs.

Prerogative Court of Canterbury.

JUNE 19.

A will of a person deprived by paralysis of the use of speech, and almost of limbs, and thereby incapable of indicating that he understood the will, — pronounced for.

IN THE GOODS OF CHARLES VENTRIS FIELD, DEC.—
Motion, ex-parte.—The deceased died on the 17th May, 1843. He left H. F., his relict, and A. E. F., his son, the only persons entitled in distribution if he had died intestate. He also left C. V. F., a son by his wife born before marriage. For some time before his death, the deceased was labouring under the effects of paralysis, which deprived him of speech, and almost of the use of his limbs. On the 13th May, his brother, F. V. F., a solicitor, having ascertained that the deceased desired to make his will, and the way in which he wished to dispose of his property, wrote a will for him, and H. L., a neighbour, was sent for to attest the execution. H. L., in his affidavit, states that, being requested to attend and become a witness to the execution of the deceased's will, he went into the bedroom of the deceased, where he found the following persons present with him:—H. F., the deceased's wife, E. F., his mother, his three brothers and two sisters, and M. C., who was attending as his nurse; that the will was then produced to the deceased by one of his brothers, who said "he had brought the paper for him to sign, and the deceased appeared to understand the nature of it, and put out his right hand to take it," but he was unable to sign his name to the will, or to make any declaration in respect thereof; that a pen was put in his hand, and he made his mark at the bottom of the first and second pages of the will; that M. C. and the defendant were both present during the whole of the time, and that they signed their names, as witnesses of the execution, in the presence of the deceased and of each other; and that he believes that the deceased was of sound mind at the time.

The will bequeaths to the testator's two children, C. V. F., born before marriage, and A. E. F., born since marriage, his household furniture, stock in trade, and all the money he possessed at his death, with the lease of his house, which

ts to be sold, and the proceeds, together with the
 ie to him, and policies of insurance on his life, to be
 . It gives to his wife the possession and use of his
 ld furniture, plate, linen, china, or such part as she
 nt, and the rest to be disposed of, and the money
 from the sale thereof to be added to the rest of his
 , for the benefit of his said two children, or the
 , and the interest thereupon to be paid to his wife,
 nd their support. It bequeaths to his brothers and
 or the survivor, equally, any interest he might have
 n property of his late father, and the residue of his
 estate to his wife, and it appoints her and his bro-
 V. F., the drawer of the will, executrix and exe-

JUNE 19.

Field, dec.

r, D., moved for probate of the will to the widow *MOTION.*
 brother. The only difficulty is, that the deceased
 say it was his will.

I. JENNER FUST.—I think that, in this case, the *DECREE.*

ay decree probate to pass. The brother has done
 for the interest of the illegitimate child, and though
 ence as to the deceased's understanding the will is
 y slight indeed, I think, under the circumstances,
 decree probate to the executors.

Probate de-
 creed.

, Proctor.

JULY 6.

E GOODS OF WILLIAM MARTIN.—*Motion, ex-parte.* A will ex-
 ceased died in the latter end of May, 1843. Being ecuted on a
 of making his will, he asked W. P. (one of the exe- printed form,
 to prepare one for him, which W. P. accordingly with directions
 printed form, headed "Will Paper," having three which were
 the first containing specific directions for preparing misunderstood,
 uting the will (the first being—"The will must be refused probate
 t the foot or end of it by the testator, or by some for want of a
 rson in his presence or by his direction"); the second strict compli-
 was a margin "for signature of testator and sub- ance with the
 of witnesses in case of any alteration in the will;" terms of the
 Act.

JULY 6.
Martin, dec.

the third column was a space for the body of the will, headed "Here write the will." W. P. read the will over to the deceased upon that and another occasion, when he declared, in the presence of several persons, his approbation of it, and on the 3rd May, 1843, he executed the same according to W. P.'s direction, by signing his name in the margins of the first and second pages (in the first to two alterations), in the presence of W. P. and the two attesting witnesses, R. M. and J. M., who subscribed the paper, each (as well as the deceased) adding the date. The last signature of the deceased and that of each witness were placed in the margin of the last of the two pages containing the will, by the side of the appointment of the executors, thus:—

James Martin, 3 of May 1843. J.M., 13 Lancaster Court, Broad Street, 3rd day of May 1843. R. M. 13 Paradise Row, Chelsea, 3rd day of May 1843.	Ponsonby, of No. 3 Cheyne Row, West Chelsea, in the county of Middlesex, should be my executors for the purpose of this my will and testament, and such appointment to continue in force as regards my children until they shall each attain the age of 21 years.
---	---

Then follows the attestation-clause, "signed by the said Wm. Martin, in the presence of us, present at the same time, who in his presence have subscribed our names as witnesses. R. M., J. M."

The property, which was small, was bequeathed equally between the deceased's two children, aged ten and two.

MOTION.

Addams, D., moved for probate of the will to the executors. The whole body of the will was written prior to execution, and the testator and the witnesses believed that they had complied with the law. The question is, whether the Court does not think that the will was well executed by the signature being at the foot or end of it. The signature is at the end, though a little on one side. [PER CURIAM.—No; it is in the middle of the paragraph appointing the executors.] It is only necessary that the signature of the testator should not be at the top or in the body of the will.

[*PER CURIAM*. The words of the Act are, "at the foot or end." I am aware that the intention of the Act was to get rid of the interpretation put upon the old law, that, if a testator began his will, "I, so and so, do declare this to be my last will and testament," it was a good execution. If the signature had been merely in the margin, that is, at the end, though on one side, it would have been a compliance with the Act; but it is in the middle of a passage of which the Court is to grant probate: "Ponsonby, &c. should be my executors, &c., and such appointment to continue in force, as regards my children, until they shall each attain the age of 21 years:" that is below the signature.] The whole of the dispositive part of the will is above the signature.

JULY 6.

Martin, dec.

SIR H. JENNER FUST.—I am afraid of putting a construction upon the Act as regards this will on *ex-parte* motion: I am afraid I have done so on other occasions.* I think, if the will had been written upon plain paper, it would have been properly signed. I do not say that the printed form is wrong, but it was probably misunderstood by the parties. Unfortunately, this printed form does lead to mistake.† I cannot say that this will is signed "at the foot or end;" it is signed in the middle of the appointment of executors. It would be desirable in this case, if the Court could do so, to decree probate to the executors, as the children are minors and young; but I cannot put such a construction upon the case on motion.

DECREE.

I must reject the motion: if the parties choose to take administration, as guardians of the children, they may do so; I do not decree it.

Pulley, Proctor.

* See *Re Wakeing*, 1 Notes of Ca. 236.

† The parties appear to have understood, from the heading of the second column, "Margin for signature of testator and subscription of witnesses, in case of any alteration in the will," that, when a will was altered, it must be signed in the margin, and nowhere else.

Parts of testamentary papers revoked, referred to in a posterior will, held to be incorporated therewith, and admitted to probate together.

JORDEN v. JORDEN.—*Allegation.*—This was a cause of propounding, in solemn form of law, the will, contained in nine testamentary writings, of Elizabeth Jorden, spinster, who died 12th March, 1843, aged 101, leaving nephews and nieces, her only next of kin. The first of the papers bore date 12th March, 1832; it referred to her will made in 1829, nominating Mr. W. and Mrs. A. trustees and executors, and directed them to consider this paper, which bequeathed various small legacies, as a codicil to the said

Second paper. will. The second paper, dated 29th December, 1832, described as a codicil, and written on the third side of the sheet containing the first, bequeathed certain rings and trinkets. The third, written below the second, and dated 12th November, 1834, made certain alterations in small be-

Third paper. quests contained in former papers. The fourth, written on another sheet, and described as "the last will," was dated 30th January, 1838, and duly attested; it contained the following passage: "What I have before wrote, and then intended as a codicil, and dated August the 18th, 1829, I now date again at this time of making my will, January the 30th, 1838: I wish every thing to stand as it is appointed in that sheet, which I now intend only as a memorandum, to assist the said Jane Phillips in distributing what I leave (being too ill to write it again)." The testatrix thereby appointed Mr. T. Pritchard and Miss Phillips joint executors, and revoked

Fourth paper. all former wills. The fifth paper, dated 18th May, 1838, and written on the fourth side of the sheet, containing the first, second, and third papers, began thus: "I, Elizabeth Jorden, having made a fresh will, and signed it, January the 30th, 1838, do not any longer consider what is heretofore wrote on this sheet as a codicil, but only as a memorandum for my executor, Miss Jane Phillips, to assister [*sic*] in giving to each person what I have left them, as she is acquainted with my intentions and with the alterations I have made since my first writing what is in this sheet;" then follow sundry small bequests. This paper is signed and sealed, but not attested. The sixth paper, written on the third side of the sheet of paper containing the will of 1838, and dated 2nd July, 1838, and duly attested, is described

Fifth paper.

Sixth paper.

codicil to that will, and refers to the "memorandum" JULY 6.
 The seventh paper, written on a separate sheet, is *Jorden v. Jorden.*
 the same day as the preceding paper (2nd July, 1838),
 so duly attested; it begins thus: "Not having room Seventh paper.
 other memorandum paper, I subjoin this as my de-
 o be observed equally as the other, as it is my will
 l I name may stand exactly as specified in both:" then
 various small bequests of plate, &c. The eighth Eighth paper.
 written beneath the sixth, on the third side of the
 containing the will, is described as "a second codicil
 my will;" it is dated 25th March, 1841, and duly
 d; it contains certain devises and bequests. The last Ninth paper.
 written like the rest with the testatrix's own hand
 h she was at this time a century old), is on a separate
 duly attested, and dated 29th June, 1842; it is de-
 l as a codicil, and it appoints her nephew, Edward
 , executor, in the place of Jane Phillips, deceased.
 Allegation, which now stood for admission, pleaded
 the fourth paper, i.e. the will of 30th January, 1838,
 d to and incorporated the legacies mentioned in the
 of paper which then contained the first, second, and
 papers, although the testatrix erroneously recited the
 s "August the 18th, 1829," by reason of the first
 beginning "Whereas, I, E. J., have made my last
 nd testament, bearing date August the 18th, 1829;"
 he recognized and identified the sheet containing the
 ree papers as the sheet mentioned in her will, by the
 ixth, and seventh papers; and that the whole of the
 -mentioned papers were found, after the death of the
 ix, folded up together and enclosed in an unsealed
 or envelope; and it concluded with submitting that
 nine papers were entitled to probate as together con-
 ; the will of the deceased.
teis, D., in support of the Allegation; *Addams, D.*,

H. JENNER FUST.—I think the directions are re- JUDGMENT.
 to in the will of January, 1838; the question is, whe-
 ey are incorporated; whether, after the 1st January,
 . II. 3 F

JULY 6. 1838, she can be considered to have meant that the directions were to be taken as part of her will. There is a sufficient identification of the paper, and I have no doubt that before the Act, it would be referred to sufficiently to entitle it to form part of the will. The real question is, whether the first three papers, having been revoked, could, after the 1st January, 1838, be incorporated by such reference. The two papers of 2nd July, 1838, which refer to the "Memorandum," are duly attested. I am of opinion to admit this Allegation, thinking that, if the facts shall be proved, all the papers are entitled to probate.

Jorden v. Jorden.
Allegation admitted.

Proctors:—*Engleheart*, for the executor; *Orme*, for the next of kin.

Judicial Committee of the Privy Council.

JULY 10.

PANTON v. WILLIAMS.

[The report of this case will be found in the Supplement pp. xxi.—lii.]

Prerogative Court of Canterbury.

JULY 12.

WILLIAMS v. WILLIAMS.—*Cause.*—The deceased, Mr. John Williams, a solicitor at Shrewsbury, died 6th March 1841, leaving a widow and minor children. In February 1832, he became totally incapable of business, but in July 1833, he was suffered to execute a will, drawn up and attested by a solicitor, making an equitable disposition of his property. The Court was moved in Trinity Term, 1841, and again in Michaelmas Term, to pronounce against this paper (which no one would propound), and decree administration to the widow; but it refused the application, in the absence of full information as to the facts from the attesting witnesses, one being the solicitor. The will was thereupon propounded on behalf of the major daughter, one of the res-

A will executed by a person in a state of utter incapacity, formally drawn and attested by a solicitor, pronounced against.
Aug. 3.
Dec. 6.

* 1 Notes of Ca. 129.

legatees, against the eldest son, a minor, appearing guardian.

more, D., for the daughter, admitted he could not the will.

ns, D., for the minor son.

JULY 12.

Williams v. Williams.

I. JENNER FUST.—It is quite impossible to sustain JUDGMENT.

The circumstances, as they first appeared before the Court, were very extraordinary, and such as did not enable me in pronouncing against the validity of an instrument so exceedingly well drawn up and prepared by a respectable person. I am now quite satisfied that all was done for the best, and as the deceased would have done it if he had been in a state of mind to give instructions for the will, there is reason to believe that, before his attack, he conceived a disposition of his property pretty much the same as before the Court. All was done for the best, with a view of giving effect to what there was every reason to suppose to be the intention of the deceased. With the evidence now before the Court, I am bound to pronounce the validity of the will, and that, so far as the Court is concerned, the deceased is dead intestate. No imputation is to be put on any party. The Court is satisfied that the course taken was for the interest of all parties.

pronounced against: the costs out of the estate.

ors:—*Carter* for the residuary legatee; *Thomas* for the Will pronounced against.

JULY 17.

ER v. BOCKETT.—*Cause*.—The deceased, Captain Henry J. Cooper, a retired officer of the Artillery, died on the 7th April, 1843. He left a will in his own handwriting, dated 7th January, 1843, bequeathing annuities and property to different individuals, and appointing his brother, Henry Spencer Cooper, barrister-at-law, and Mr. Daniel Bockett, his executors. The will purports to be attested by two witnesses, George Crittenden and Mary Crittenden, who were the porter at the house, in Pall-Mall East, where the will was signed by the testator, and purporting to be attested by two witnesses, both of whom (one positively, the other, "as far as the witness can now recollect") depose that the signa-

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*Cooper v.
Bochett.*

ture was not
affixed till after
attestation, —
pronounced for,
the Court dis-
trusting the re-
collection and
impression of
the witnesses,
not supported
by the *res*
gestæ.

the deceased lodged, and the latter his wife. At the end of the will is a codicil, giving a legacy of £50 to his servant; this codicil was not attested. The will exhibited various alterations and interlineations (the former in very dark ink), which were likewise unattested. The question was, on the evidence of the subscribed witnesses, whether the signature had been made or acknowledged in their presence. The circumstances to which they depose are detailed in the judgment.

Jenner, D., for the executor; *Addams, D.*, for the brother and next of kin.

JUDGMENT.

The codicil
void.

SIR H. JENNER FUST.—Certainly, in this case, the Court finds itself in very considerable difficulty. As to the codicil, it is clear that it can have no effect, as the servant did not enter the service of the deceased until March, and the will is dated in January; it is clear, therefore, that the codicil was added after the will had been executed, and, not being attested, it is void. The will purports on the face of it to be signed by the deceased, and to have been witnessed by George Crittenden and Mary Crittenden; and the question is, whether it was signed by the deceased in their presence, or whether the signature was acknowledged in their presence when they attested the will.

Now the witness George Crittenden states that, at the time of the transaction, he was in a state of confusion, and being asked as to the alterations on the face of the will, he says, "I cannot say whether they were or were not on the will when I signed it." It is somewhat extraordinary that he should not have observed them at the time, as they are so very plain and distinct that it is hardly possible they could have escaped the attention of persons called to attest the paper. He says: "I have something on my mind that there was something of the kind, too; but I was confused and flurried at the time; for though I was but signing my name to a will, yet I had never done so before, and I did not know but that trouble might come of it; and the captain was a very sharp and severe man, and I was not so much at my ease as to observe exactly what occurred, or what ap-

rice the will had. I do firmly believe, however, that
 was some black scratching on the will when I signed
 He states, therefore, that, at the time of the transac-
 He was in some degree of flurry and confusion, and was
 > much at his ease as to observe exactly what occurred,
 Consequently, the testimony of such a witness must be
 with some degree of allowance.

W the evidence of this witness and his wife,—the only
 nce which can be taken as conclusive on the point,—
 to establish the fact that the will was signed by the tes-
 after they had attested it, for both of them state their
 that there was a blank space where the signature now
 hen they attested the will. George Crittenden states
 he had been out for the deceased with a letter for Mr.
 er, the deceased's brother, and, on his return, he went
 room to tell him that he had not found Mr. Cooper at
 , and he says,—

ound him writing at a table, and when I had delivered my
 ge, he desired me to sit down, and when I had been sitting
 out five or ten minutes (and he was writing during that time),
 d to me that he wished me to put my name to something—
 ords were, "I want you to sign your name to this paper,"—
 as the paper before him,—“will you?” I said, “I don't
 what I am going to sign, Sir.” He said, “Oh, you need not
 aid, for this is my will.” I then rose up to sign, and he then
 “You had better fetch your wife up-stairs first.” And I said,
 “I do so, Sir?” And he said, “Yes.” From that I went
 tched her up, and when we went into his room, we found
 tanding at the table, which he had been writing at, with a
 l in his hand, and as he was standing, he wrote my name and
 ife's name in pencil. My wife asked him if he knew how
 ll our names, and he said, “Yes,” and repeated it, “Crit-
 n,” and my wife said that was right. Then he sat himself
 and called us to the table, and he put the will towards me,
 aid, “You sign your name there,” pointing to my name,
 a he had written in pencil; and I took the pen and wrote my
 over the pencil-mark. Then he said to my wife, “Now, you
 your name on this pencil-mark,” pointing to the one under
 —“you'll write your name better than he has done his.”
 my wife signed her name. Then Captain Cooper took the
 from my wife, and wrote, and when he had done, he said,

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Evidence of
 the first wit-
 ness.

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Bockett.*

looking up at me, "This is my name in your presence," and I understood then that he was writing his own name. I did not see all he wrote, but I saw him make the large R of his name, and there was a black seal at the left-hand corner, quite; but there was nothing said about that, and after he had wrote his name, he said, "Now, you have done some good for yourselves." Nothing more passed. He said, "Mrs. Crittenden, I don't want you any more; you can go;" and my wife went down stairs. I stopped a few minutes afterwards, when he told me that he did not want any thing more with me, and I went away. He wrote nothing but his name, at least, I believe it was his name, in our presence. As soon as he had done, he put down the pen and wrote no more. Before he signed his name, he made a mark round ours. The will now produced to me by the Examiner is the will which I and my wife signed our names to, as I have deposed, and the large R, in Captain Cooper's signature, is what I saw him write after I had signed my name and my wife had signed her's. The words "9, Pall-Mall East, servants at house," were not written in my presence, to the best of my belief. Captain Cooper wrote nothing in my presence but his name.

Upon the Interrogatories he says:—

Captain Cooper did sign his will in my presence; I believe that he did; and he certainly acknowledged it in my presence, for he said, "That is my name." He signed it, as I have stated, after I and my wife had signed our names to it. The very words he used were, "This is my name in your presence," and he looked up to me, as I was standing on his right-hand side, at the time. My wife was present at the time, standing behind me; it was after we had signed our names. I do not believe that Captain Cooper's signature was to the will when I and my wife signed it; there was a blank space where his signature now is when I signed my name. When I have been questioned about the matter, I have stated, and it is the fact, that Captain Cooper had a pencil in his hand, and wrote my name and my wife's on the place where we afterwards signed our names. I have said that he was writing with a pencil when we went into the room. I have never said, and it is not the fact, that I first signed my name to the will in question at the request of Captain Cooper, and then called up my wife, who also signed. I have never said, and it is not the fact, that Captain Cooper signed his name to the will in question after my wife had signed her name to it and left the room. I have never told my wife so; I will swear that I never have.

Now this is the evidence of George Crittenden; and if he is to be taken as having deposed correctly and truly, there is very little doubt that he means to represent that the deceased signed his name after the witnesses had attested the will. The wife also, Mary Crittenden, states that she was called into the room by the desire of the deceased, and she says:—

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—
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Bockett.

And so I went with my husband to the Captain's room, and there the Captain was standing at his table, with a piece of paper before him, and he took a pencil and said that he wanted us to sign our names, and he would pencil them first where we were to sign; and so I said I would take the liberty of asking him if he knew how to spell our name, and he spelt it, and spelt it right; and when he had written the names, he gave my husband the pen, and told him to write his name over the pencil-mark, and my husband wrote his name, as he was told; and when he had written it, the Captain gave me the pen, and told me to write mine, and said, "I dare say you will write it better than he has;" but I don't think I did write it better. However, I wrote my name, as the Captain told me, over where he had pencilled it; and then the Captain took the pen, and made a kind of circle round our names, and then he wrote something, but what it was I cannot say, for my husband was standing near him and in the way; but the Captain said, "This is my will and my name in your presence, and you have done some good for yourselves." These were the words he used, as well as I can recollect, and he said nothing more, except to tell me to go down stairs, as he did not want any thing more with me; and so I went, leaving my husband with him, and this is all I know or recollect about it. But whether he wrote the words, "9, Pall-Mall East, servants at house," after we had signed our names, or what he wrote, I cannot say, for I did not see. It was a blank space all to the right, as well as I can recollect, the black seal at the left corner; and I should have known it was a will, even if the Captain had not said so, though I had never seen one before, by that seal; I remarked it so at the time.

Evidence of
the second witness.

She says she did not notice whether there were or were not any of the alterations which are now upon the will. In answer to the Interrogatories she says:—

I cannot say whether Captain Cooper signed his will in my presence or not; I did not see what he wrote; but he said, "This

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is my will in your presence," and so I suppose he had written his name when he said so. I do not recollect the words he used better than I have told them. My husband and I were both present at the time Captain Cooper used those words, and it was after we had signed our names to the will. I cannot say that Captain Cooper's name was signed to the will when I signed it: as well as I can now recollect, it was all blank where I now see Captain Cooper's signature. My husband had not signed Captain Cooper's will before I was called into the room to sign it. I will swear that my husband signed it afterwards in my presence. My husband has never told me that Captain Cooper signed the will after I had left the room; it was after I had signed my name, and not before, that Captain Cooper made the mark round about our names.

Thus, as far as the wife is concerned, she states that she does not know what the deceased wrote; that she saw him write something, but what it was she cannot say; that she did not see the name of Captain Cooper, and that, where the name now is was all blank. The husband is more precise, and says that the will was signed by the deceased after they had signed their names, and that he saw the deceased make the large R of "Robert," in the name of Captain Cooper.

The Act requires that the signature shall be made or acknowledged before attestation.

Now the question for the Court to determine, under these circumstances, is, whether there has been a due execution of this will. Under the Act, it is absolutely necessary that the deceased should have signed the will in the presence of the witnesses, present at the same time, or have acknowledged his signature in the presence of the witnesses, present at the same time, and that they should have attested it in the presence of the testator, though not of each other. The interpretation which the Court has put upon the Act is, that the testator must sign or acknowledge his signature before the witnesses attest; and that, if the witnesses attest before the signature of the deceased is affixed to the will, it is not duly executed within the provisions of the Act. The Court has held that, although the will has been signed in the presence of two witnesses, who had attested it before the signature was affixed to the will, it was not a compliance with the Act, for where is the Court to draw the line? Suppose

witnesses attested an hour before the testator signed, or
 or a week, or any other time—where is the Court to
 f it gave a latitude of construction to this section of
 t? Suppose it were one month, or six months, or a
 month, before the testator had signed the will; and
 r it be at the time of the transaction, or some time
 makes no difference. The words of the Act are pro-
 e; “it *shall* be signed at the foot or end;” “such
 re *shall* be made or acknowledged by the testator in
 esence of two or more witnesses,” and “such wit-
 shall subscribe the will in the presence of the testa-
 It does not appear to me that the requisites of the
 ould be complied with, if the Court were to hold that
 tor might sign after the witnesses had subscribed,
 at the same time, or in two hours or two weeks after-
 I am, therefore, of opinion that, if it appear from
 idence of the witnesses, and the *res gesta* and cir-

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Bockett.The words
prospective.

the sittings after Michaelmas Term, this construction of sec. 9 Dec. 18.
 ct, which had been hitherto given on motion, or incidentally
 is directly and formally decided in the case of *Willmott v. Gill-
 ich* was an Allegation expressly pleading, on behalf of the party
 ding the paper, that the testator had signed it after the attest-
 esses had affixed their signatures, and raising the simple ques-
 ether, if the acts were contemporaneous, the Statute prescribed
 icular order of signing.

hearing *Addams, D.*, against the admission of the Allegation,
gard, D., *contra*, the Court said:—

n of opinion that the witnesses must attest after the signing of
 y the testator. In *Ilott v. Genge* (1 Notes of Ca. 572), the whole
 was raised and decided by this Court. It is quite impossible
 Court can admit this Allegation, which expressly alleges as a fact
 deceased signed the will after the attestation of the witnesses.
 hat did they attest? The Act says that the signature of the
 ‘shall be made or acknowledged by the testator in the presence
 r more witnesses present at the same time’—what then?—‘and
 nesses shall subscribe the will in the presence of the testator.’
 y collocation of the words shews that the will should be first
 y the testator, and then that the witnesses should subscribe the
 his presence; whereas this Allegation admits that the wit-
 ttested before he signed or could have acknowledged his signa-
 at is, that the Act (according to the Court’s opinion) has not
 plied with. Therefore, I reject the Allegation.”

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*Cooper v.
Bockett.*Result of the
evidence.

cumstances of the case, clear that the will was signed by the testator after the witnesses had attested, it is not a good execution of the will. The question, therefore, is, what is the result of the evidence?

Now, George Crittenden first entered the room, and was with the testator alone before the execution took place; he states that he was five minutes in the room whilst the testator was writing before his wife was sent for, and that the testator desired that the wife should be fetched; and if we are to trust the evidence of George Crittenden, the deceased wrote their names in pencil: he says he marked their names in pencil, saying, "You sign your name there," pointing to the name of the witness, which he had written in pencil, and the witness wrote his name over the pencil-mark, and his wife did the same, and the deceased then took up the pen and wrote, and said, "This is my name in your presence." Here it seems as if there was an acknowledgment in the presence of two witnesses, by the testator, of his name being at the time to the will; and the only question is, whether this was done before or after the attestation of the witnesses; it all depends upon the recollection of this one witness, as the wife does not remember the circumstances. The husband is more precise; if the Court can attend to his account of what took place, in the state of mind he was in at the time—a state of confusion, as he admits; and the Court has been called upon (and very properly) to pause before it trusts implicitly to the evidence of these two witnesses; and looking at the paper itself, I cannot place implicit reliance on their accuracy. What are the facts? The paper is all in the handwriting of the deceased. It concludes: "I name executors to this my will D. S. Bockett, of the Law Life Assurance Society," and a wide space occurs after "will," as if there had been,—and evidently there had been,—the entire name, and the seal covered part of the name, and "Daniel Smith" is interlined. After "Society," there is also interlined "60, Lincoln's Inn," and written over another word "to whom;" then, "I will one hundred pounds sterling, and my brother Henry Spencer Cooper above-named:" part of this had been covered by affixing the seal. Then at

Implicit reliance cannot be placed on the accuracy of the witnesses.

the end: "at 9, Pall-Mall East," with part of the word "made," and "this seventh January, 1843." Then follow, in a circle, "witnesses to the said will," and below, "signature," and this seems to be in the same ink as "9, Pall-Mall East, servants at house;" and this is preceded by "George Crittenden, Mary Crittenden," and "R. H. J. Cooper" is at the end of the paper. Now, I should say that "R. H. J. Cooper" was written at the same time that the latter part of the will was written; it is in the same ink and same writing as "signature" and "witnesses to the will;" and it would appear as if the deceased had written "witnesses to the will," and afterwards, "witnesses to the signature," otherwise I do not know what is the meaning of the word "signature," unless it be the signature to the will.

I must say, I can place no strong reliance on the impressions of the witnesses. From the confusion in which George Crittenden was when he was required to sign the will, his mind, as he says, was not at ease to observe the course of the transaction. Here is a bare recollection of these two witnesses, contrary to the appearance of the paper, that the signature "R. H. J. Cooper," was added after they had attested the execution, and the Court, if it so holds, must rely entirely on the accuracy of their recollection of the facts. In the case of *Blake v. Knight*,* the Court pronounced, against the positive testimony of three witnesses, in favour of the validity of the paper, and from the whole circumstances of the case, held that the witnesses were mistaken. There, the witnesses were examined four or five years after the transaction, and here they have been examined within a few months. But, in this instance, one of the witnesses is not positive, and speaks only to her recollection and belief that the name of the deceased was not to the will when she signed it; that, "as well as she can now remember," it was all blank where his signature is. Now, where the *res gestæ* do not confirm the impressions of the witnesses, the Court must look at the circumstances of the case, as it is always at liberty to do. In *Blake v. Knight*, I did not give implicit credence to the wit-

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the circum-
stances.

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nesses, not from any doubt that they intended to speak the truth, but because they did not recollect the circumstances sufficiently to speak with accuracy. George Crittenden admits that he was in a state of confusion, and though he says he saw the deceased make the large R of his name, and though he does not believe that the name was to the will when he and his wife signed it, he says he was flurried and confused at the time, and not sufficiently at his ease to observe exactly what occurred. I say, therefore, that the Court cannot give implicit credence to this witness, so as to hold that the witnesses attested before the execution of the will.

Will pro-
nounced for.

Under the circumstances, I am of opinion that the paper was duly executed by the deceased; and that, though he may have written on the paper in the presence of the two witnesses, the witnesses are mistaken as to what the deceased did write, which, as far as the Court can judge, may have been the word "signature" on the left-hand of the circle, and "9, Pall-Mall East, servants at house," at the right-hand corner of the paper. I am of opinion that the Court is bound to pronounce for the validity of the paper.

Aug. 8.

(With respect to the alterations, the Court desired to have some evidence as to whether the passages obliterated could be made out, and it reserved its final judgment till it was produced. On a subsequent day, upon the affidavit of Mr. Netherclift, as to the state of the alterations, the Court, on motion, pronounced for the will as it stood.)

Proctors:—*Nelson*, for the brother and next of kin; *Fox*, for the executor.

A will of 1837, disposing of real and personal property, altered by a codicil of 1837, was republished in 1838, as "this writing;"—Held that an ambiguity as to the motive of republication

UPFILL v. MARSHALL.—*Cause*.—This was a cause of proving in solemn form the will of Mr. Thomas Smith, which was propounded by Mrs. Emma Uphill, a married daughter of the deceased, and an executrix of his will, against Mrs. Fanny Marshall, another married daughter, and the other executrix. The deceased left a will, disposing of real and personal estate, and which was regularly executed, dated 27th February, 1837. On the 17th June, 1837, he executed a codicil, on a separate paper, whereby he re-

voked a power of disposition given by the will over £1,000 granted to Mrs. Marshall. On the 10th July, 1838, he republished his will, in the presence of witnesses, by passing over his signature with a dry pen, the following words being written at the foot of the will: "This writing was republished by the said testator, T. S., as and for his last will and testament, in the presence of us, who, in his presence, at his request, and in the presence of each other, have subscribed our names as witnesses thereto, on the 10th day of July, 1838.—N. J. G.—J. O." On behalf of Mrs. Upfill, an Allegation was brought in, which pleaded that, subsequent to the making and executing of the will and codicil, but previous to the 10th July, 1838, the testator purchased certain freehold premises, and meaning and intending to subject such after-purchased property to the same trusts as were contained in the will, and to republish the same, on the 10th July, 1838, he produced the said will and republished the same. The questions were, whether the codicil of June, 1837, was revoked, and whether parol evidence was admissible to remove the ambiguity.

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arose on the face of the instruments, which let in parol evidence, whence it appeared that the testator had purchased land after the date of both will and codicil, and that he did not express an intention by the republication to revoke the codicil:—Held, thereupon, that the republication of the will did not revoke the codicil.

The admission of the Allegation was opposed.

Sir John Dodson, Q.A., in opposition to the Allegation. May 19.

Under the rule of law, parol evidence is not admissible in this case, as there is no ambiguity on the face of the instrument. The testator republishes "this writing," thereby expressly confining it to his will. *Thorne v. Worrall*;^{*} *Miller v. Travers*.†

R. Phillimore, D., on the same side.

Addams, D., in support of the Allegation.—The intermediate paper, respecting which the question arises, is *dehors* the general provisions of the will; it merely revokes the power of disposition over £1,000 given to one of his daughters, and makes another disposition of it. Was this codicil ever revoked? It is a question of revocation, not of ambiguity. By the very words of the 22nd section of the Wills Act, parol evidence must be received in every case of revocation. All questions of revocation are questions of inten-

^{*} 1 Notes of Ca. 254 (since rep. 2 Curt. 799).

† 8 Bing. 244.

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admitted.

tion ; for if it can be shewn that there was no *animus revocandi*, there is no revocation.

PER CURIAM.—I am disposed to admit this Allegation to proof, in order to see what are the circumstances under which the testator republished the will, for the reason just stated, that it is a question of intention. I wish to see what the circumstances are which distinguish this case from *Thorne v. Worrall*. I admit the Allegation, reserving all questions.

Evidence.

The two witnesses, who attested the republication, were examined on the Allegation. One of them deposed that his impression was, that the deceased told him the object of the republication was to pass some estate purchased since the execution of the will, and that he attested it under the impression that such was the sole object of the republication ; that nothing passed in his presence to lead him to suppose that the intention of the testator was to revoke or affect any codicil to his will. The other witness deposed that he had no recollection that any thing was stated as to the object of the republication ; that he presumed, at the time, it was necessary on account of some fresh property purchased since the will had been executed, though he does not know that he was aware of the deceased having purchased such property ; he had no idea that the republication was with the intention of revoking any codicil ; no allusion was made to any codicil.

July 17.

ARGUMENT.

Addams, D., for Mrs. Marshall.—The will was not originally within the provisions of the Wills Act. Under the Statute of Frauds, there could be no republication except by re-execution, or by some codicil. Here, the testator does not republish the will by a codicil, but by going over his signature with a dry pen, in the presence of witnesses, who attest that “this *writing*” was republished by the testator “as and for his last will.” How it can be contended that such a memorandum is to revoke the codicil of 1837, I cannot understand. *Crosbie v. McDoual*.*

Haggard, D., on the same side, cited *Ponys v. Mansfield*.†

* 4 Ves. 610.

† 3 Myl. & C. 359.

Sir John Dodson, Q.A., for Mrs. Upfill. I submit that, the later codicil of July, 1838, the will alone is re-lished, not the intermediate codicil of June, 1837, which evoked. I admit that, generally speaking, a codicil re-lishing a will is sufficient to establish every codicil to it, forming part of that will; but the circumstances of this take it out of the general rules. The codicil of June, 1837, takes part of the will of February, 1837; the codicil of July, 1838, republishes the will only, thereby revoking the executory part of the codicil. The intention of the testator to republish the will, and not the intermediate codicil. The language, "this *writing*," shews that it was that specific writing only he intended to be his will. There is no ambiguity on the face of the memorandum of republication to authorize the admission of parol evidence. *Thorne v. Wor-* But if there was ambiguity, the evidence leaves the weaker than before. The two attesting witnesses say they have no recollection of any thing having been said by the deceased as to the object of republishing the will. [PER CURIAM. The Answers of the party admit every thing—they admit that it was done to pass the after-purchased estate.]

*L. Phillimore, D., on the same side, cited Guy v. Sharp; * Nentson v. Gandy; † Thorne v. Worrall; Fawcett v. Es; ‡ Rogers v. Pittis; § Walpole v. Cholmondeley; || Coke v. Kent. ¶*

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SIR H. JENNER FUST.—With regard to the two papers. JUDGMENT. Had before 1838, there is no doubt that, if nothing else had been done by the deceased, they would both have been entitled to the probate of the Court. But it appears that, in July, 1838, he republished his will by going over the signature with a dry pen, and adding a memorandum of the republication at the foot of the will, which is attested by two witnesses; and it is contended that, by this republication of the will on the 10th July, 1838, the deceased revoked the codicil of June, 1837, because there is a clause in the will

* Myl. & K. 589.

† 1 Keen, 309.

‡ 3 Phill. 434.

§ Add. 37.

|| 7 T. R. 138.

¶ 1 Notes of Ca. 98.

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revoking all previous wills, and the will is made to speak from the day of republication. An Allegation given in on behalf of Mrs. Uppill, one of the daughters of the deceased, propounding the papers, to shew the ground of republication, avers that it arose, not from any change of intention in the mind of the deceased, but in consequence of his having purchased a freehold estate after the date of the will, and he wished to make such estate subject to the same trusts as in the will, and that, on this ground alone, without reference to the codicil, the will was republished.

The ambi-
guity.

Now, the fact of the purchase of land after the date of the will and codicil is admitted, and in these circumstances, the only question is, whether there is any ambiguity on the face of the will. Where was the necessity for a re-execution of the will at all? Here is a will disposing of real and personal property, which is republished by a codicil in June, 1837, without any circumstance upon the face of the will to lead to any conclusion as to the necessity of a republication. Where a will disposed of real and personal property, a republication of the will, before the stat. 1 Vict. c. 26 came into operation, was necessary in order to pass after-purchased land; but it was not necessary to pass personal property, as all the personalty passed under the will; and, therefore, where a necessity for a republication exists as to one species of property and not as to another, the Court is bound to take it that the republication was on that ground only, which required republication to give the will its intended effect. Suppose a case of the republication of a will, where there was no necessity for it, the property being personal property, that would raise an ambiguity as to its meaning and effect; and on the clause of republication, "This writing was republished by the testator," this question arises: the will disposes of both real and personal property, and if it is republished, why? Because, it is said, there was after-purchased property, and therefore the necessity arose for republication from the circumstance that no real estate will pass under a will if purchased after its execution; and thus there is an ambiguity on the face of it, which lays a ground for the admission of parol evidence. The admission of parol

to explain, but to shew the motive, and, as Lord
 um said, in *Guy v. Sharp*, in order to place oneself
 same situation with the party who made the instru-
 nd be thereby better able to understand his mean-
 to ascertain, in short, the *quo animo* of the act.
 rt is to endeavour to ascertain whether the testator's
 ive in republishing his will was, as stated, to give
 the disposition of after-purchased property. I think
 sition of ambiguity does arise on the face of the in-
 ts, as there was no necessity for republication as far
 personal estate was concerned. The will itself and
 cil itself raise the ambiguity.

of opinion that, with respect to the old law, it is ne-
 to shew the *quo animo* with which this memorandum
 itten, and though it does appear that there was a
 executed prior to its date, still the Court is bound
 ome limitation to the words of the clause. I am of
 that the codicil is a good and valid codicil.

JULY 17.

Upfill v.
*Marshall.*Codicil pro-
nounced for.

ors:—*Nelson*, for Mrs. Upfill; *Middleton*, for Mrs. Mar-

case of *Pennant v. Kingscote*, which occurred the same
 lowing the preceding, a question arose similar to that in
Bockett, ante, p. 391. The will was in the handwriting of
 atrix, a lady of 61 (who died in March, 1843), the execu-
 which purported to be attested by two witnesses, a clergy-
 d the butler in the family where the testatrix was staying
 it at the time when the will was executed, in 1841. These
 esses deposed in direct opposition to each other on the
 to the deceased's having signed before attestation; but the
 cy of their recollection being apparent, and on the part of
 articular admitted, the Court said it could not rely on the
 y of the recollection of the witnesses so as to trust to the
 ions on their minds, and to be so satisfied that the will was
 ed after attestation, as to be able to pronounce against it
 point, and, therefore, pronounced for the validity of the

Pennant v.
Kingscote.

NEATE AND BROOKHOUSE v. PICKARD.—Cause.
 A will and codicil, revoked by marriage, under the Statute, held to be revived by a codicil made after the marriage, ratifying the testator's "will," without express reference to any particular will.—Alterations on the face of the will so revived held to be republished by the codicil, the will being revived in the state in which it was at the date of republication.

was a business of proving the last will and two thereto of Mr. Thomas Pickard, by the executors in the will and codicil, against Ann Pickard, the deceased, cited to see proceedings. The Al pleaded that, on the 27th March, 1835, the testator executed a will, which was attested by three witnesses; that, on the 16th October, 1839, he wrote with his own hand, a last sheet of the will, a codicil, which was duly executed and attested; that, on the 4th February, 1843, the testator, married, and on the 14th of that month, wishing to make a provision for his wife, he executed a further codicil, which was duly attested; that, on the succeeding day (4th February, 1843), he deposited his will and two codicils with his solicitor for safe custody, and that they remained in his possession till the testator's death. There were no alterations on the face of the will. The question was whether the will, which was revoked by the marriage, was revived by the codicil of 1843, which did not expressly or confirm that particular will, referring only to "the will of me," and "my said will."

ARGUMENT.

Robinson, D., for the widow.—In order to revive a revoked will, by a subsequent codicil, the reference to the will intended to be re-set up must be explicit on the face of the codicil. *Jarman, on Wills*.* [PER CURIAM] You shew any other will to which the codicil could refer. The Affidavit of Scripts refers to other wills from 1835. The terms of the codicil are vague as to the particular will to be revived. There is no reference to any particular date, or executed in a particular house deposited in a particular place.

Robertson, D., on the same side.—It is conceded that the deceased intended to ratify and confirm a certain papers; but his words leave it doubtful what. It is difficult to know whether he uses the words "last will" in a legal or popular sense—whether as the aggregate constituting his *voluntas*, or the last paper in date.

* Ch. iv.

ended to be revived must be distinctly referred to
ified.

s, D., *contrà*, was stopped by the Court.

JULY 17.

*Neale v.
Pickard.*

JENNER FUST.—I have not any doubt as to the JUDGMENT.
the codicil.

ceased died in 1842, leaving a daughter, to whom,
made in 1835, he had left his whole property, and
ed a codicil in 1839, which is on the same paper
ll. But on the 4th February, 1843, he re-married,
e Act 1 Vict. c. 26, sect. 18, it is enacted, "that
l made by a man or woman shall be revoked by
' marriage." The will of 1843 was, therefore, re-
ot by cancellation, but by the marriage of the party.
necessary, consequently, in order to give effect to the
t it should be revived by republication, or by an in-
in writing executed for the purpose of reviving such
will or codicil, or any part thereof, which shall be in
er revoked, shall be revived otherwise than by the
ion thereof, or by a codicil executed in a manner
ore required, and shewing an intention to revive
" Now the will of 1835 and the codicil of 1839
revoked except by marriage, there being no can-
nor any execution of a subsequent will, the de-
marriage taking place on the 4th February, 1843;
4th, a few days after, he executed a codicil, by
e purports to ratify and confirm "his will." The
ust be sceptical indeed if it could suppose that it is
will he meant, and no other, for though no date is
to, and though there had been a will of prior date,
forthcoming, and the only will that could be re-
is the will of 1835, confirmed by the codicil of
low, the will and codicil having been revoked by
? marriage,—for there was nothing to revoke them
ct of marriage,—if this codicil purports to confirm
y his will, it must be that will which was revoked
narriage, under the statute. Now, what are the
the codicil? "This is a codicil to the last will
ment of me, Thomas Pickard;" and "in all other

JULY 17.

Neats v.
Pickard.

respects, I ratify and confirm my said will." What was his "said will?" His last will and testament. It is not like the case of *Walpole v. Cholmondeley*,* where there was a wrong date. This is the only will of the testator in existence of which the Court is aware, and, therefore, the codicil does revive the will which was revoked by the marriage, which is the will referred to in the codicil itself. It cannot be contended that the testator did not mean to ratify and confirm some will, and what will? There is no other will before the Court; up to the 4th February, 1843, there is no doubt that the will of 1835 and the codicil of 1839 were entitled to probate, and why not now? In consequence of the deceased's marriage. He, therefore, makes a codicil to revive the will so revoked by his marriage, and I have no doubt that he intended to revive such will and the codicil of 1839.

The altera-
tions.

But there is another question, as to the alterations. The question is, whether the codicil does not revive the will as it now stands. Where a will is republished, the codicil republishing it gives effect to the will in the state in which it was at the time of republication: that seems to be the common sense of the case. [*Addams*.—The 22nd sect. of the Act provides that, "when any will or codicil, which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shewn."] What was the state of the will at the time when the codicil

A will, when
revived, is re-
vived in its then
state.

of 1839 was executed? I cannot but think that, where a will has been revoked wholly, when revived, it is revived as it was at the time of republication: that is my impression. I think it was the intention of the deceased in the alterations to revoke these legacies, and therefore he could not have intended to revive that part of the will which he had revoked before, and I therefore pronounce for the will in its present state. The will was revoked by an act under the statute, and is revived by a codicil, and it must be revived in the

* 7 T. R. 138.

state in which it was at the date of the codicil which alone gives it operation.

(The will and two codicils pronounced for, as the will now stands: the costs out of the estate.)

Proctors:—*Thomas*, for the widow; *G. Fielder*, for the ex-cutors.

JULY 17

Neate v.
Pickard.

Will and co-
dicils pro-
nounced for.

High Court of Admiralty.

JULY 20.

THE “*BETSEY*.”—*Act on Petition*.—This was a claim for remuneration for alleged salvage services rendered to the brig *Betsey*, which met with foul weather on entering the river, on her voyage from Liverpool to London, in January last, and the master employed the steam-vessel *Copeland*, belonging to the Shipowners' Towing Company, on the 15th, to tow her up to London, but, from stress of weather, she afterwards put back to Ramsgate. An agreement was made to pay £50 for the service; but, on the part of the *Copeland*, it was contended that circumstances had changed the service from towage into salvage, and that the agreement was, therefore, not binding. The owners of the *Betsey* tendered the £50, with £12 for a cable broken, belonging to the *Copeland*. The value of the vessel, with cargo and freight, was £2,893.

Salvage.—An attempt to convert a towage service, under an agreement, into one of salvage, —not sustained.

Addams, D., for the salvors (with *Bayford*, D.), cited the “*William Brandt, jun.*,”* in which the Court had held that an agreement for towing was not binding under an altered state of circumstances, and had pronounced for a salvage service.

ARGUMENT.

Sir J. Dodson, Q.A., *contra*.

DR. LUSHINGTON.—This case, in the first instance, assumes the shape of a mere question as to the *quantum meruit* of the party who performed the service. However, when the case comes to be examined, other questions arise of a very different nature.

JUDGMENT.

* This case will be found reported in the Supplement, p. lxvii.

JULY 20.

The Betsey.

The salvors, in the original Act on Petition, state that, seeing this vessel lying at anchor in the Queen's Channel, with her ensign hoisted as a signal for assistance, the *Copeland* went to her, and they state what the condition of the vessel was at the time. It is clear that the brig had been exposed to severe weather, and was in a leaky condition, with her sails much damaged. Now, I think that the agreement, whatever it might have been, was made with adequate knowledge of all the previous circumstances of the case, as relating to the state and condition of the vessel requiring assistance. The agreement was, that the *Copeland* should, at daylight on the following morning, tow the vessel up to London for £50, and after that agreement, the *Copeland* left her and ran under Broadstairs for the night. It appears that the weather, though not boisterous, was by no means calm, as is subsequently alleged on behalf of the owners; because, in the original Act, it is said that, at the time they saw the *Copeland*, they were making for the Foreland, in order to take shelter under it during the night, the wind blowing a smart breeze from about west. Both parties agree that an agreement was made on the afternoon of the 15th; and such agreement is binding on both, unless, by operation of law, or consent of parties, it has been rescinded. In the original Act I do not find that any thing whatsoever was said as to this agreement having been cancelled, though at the end of the affidavit, sworn on the 14th of April, 1843, by Mr. Murray, it is stated, "that when he commenced towing the *Betsey* up the river, on the morning of the 16th of January, he distinctly informed the master that he did not now consider himself bound by the original agreement of £50; at which the master of the *Betsey* entreated him not to leave him, and told the deponent, that they would hereafter agree what sum should be paid for the services of the steamer; that the master of the *Betsey* frequently declared, that he did not consider the agreement as binding on the deponent; and that, had it not been for the services of the *Copeland*, the *Betsey* would inevitably have been lost."

The fact of the agreement being admitted, it follows that the owners of the steamer must shew satisfactorily that, in

some way or other, this agreement no longer continued to be obligatory on the parties; and that has been attempted in two ways—first, by alleging that it was cancelled by mutual consent; secondly, by stating that, if it was not so cancelled, it was altered by the occurrence of inevitable circumstances, which changed the nature of the service to be performed. With regard to the cancellation, it is distinctly averred on the one hand, and as distinctly denied on the other; there is the affidavit of Murray to the fact of its being cancelled; and there is the affidavit of Thompson, the master of the vessel salvaged, directly in opposition: there is no other evidence as to the cancellation of the agreement that I am able to discover. I consider, therefore, that, with regard to the cancellation of the agreement by consent of the parties, I am bound to say that no such cancellation is proved, and for this reason: he who takes upon himself to establish the fact that an agreement, which is already admitted to be binding, has been invalidated by consent of both parties, is bound to prove to the satisfaction of the Court, by clear preponderance of testimony, that it was actually cancelled; and this has not been done.

Then, with regard to the second point, that the agreement, though originally just and equitable, in consequence of the occurrence of inevitable circumstances, has been of necessity defeated; or, in other words, that the steamer is now entitled to claim for salvage according to the *quantum meruit*. In order to support this proposition, the case of the "*William Brandt, junior*," was cited. That was a case which came before me under these circumstances: it was exceedingly entangled; there was great contradiction with regard to the time when the towage service should commence. On the one hand, it was alleged that it was not to commence till the weather had moderated; and on the other, that it was to commence immediately: and the Court had considerable difficulty in finding its way to any thing like a conclusion. But the real point on which the case turned was the following. In the performance of the duty of towage, the *William Brandt, junior*, in consequence of the weather, without any blame attaching to the steamer towing her, got on the

JULY 20.

*The Betsey.*Not proved to
be cancelled.The "*William
Brandt, junior*."

JULY 20.
The Betsy.

sand, and very great exertions were necessary to be used in order to extricate her from her dangerous situation. I was of opinion, in that case, and I am of opinion now, that the agreement for towing the vessel did not cover services of that description, and I see no reason to repent the doctrine laid down on that occasion. The first consideration is, whether the circumstances of this case bring it within the terms or true meaning of the opinion I then expressed. It is to be recollected that there the steamer was in the actual performance and discharge of the agreement itself, as admitted on both sides. Here the case of the steamer is, that the agreement was entirely at an end, and that she is performing a service in the nature of a salvage service, the reward for which is to be settled hereafter. That is one circumstance which appears to create some degree of distinction, at least, between the cases, because the owners of the *Copeland* cannot say, "we were honestly, fairly, and skilfully discharging an agreement already made, and circumstances which we could not foresee altered that agreement."

I must, therefore, look at the case in the second point of view, and consider whether, if the original agreement were a subsisting agreement, not cancelled by the consent of parties, new and extraordinary circumstances were engrafted on it—circumstances which neither party could reasonably be expected to foresee, and which were not fairly in their contemplation at the time they made the agreement. I confess I have very great difficulty in saying that any such circumstances exist in the present case. True it is, that the wind increased on the morning of the 16th, but surely that was an occurrence at that season of the year—with a brisk wind from the west on the afternoon before, so that it was necessary that the *Copeland* should take shelter under the North Foreland—within the contemplation of the parties. The only other circumstance I find of importance is, one that is in some degree of dispute, as a question of fact, between the parties—namely, whether or not the vessel, after the steamer quitted her, at four o'clock on Sunday afternoon, was compelled, in consequence of the increasing violence of the weather, to have a second anchor

Agreement
 not altered by
 circumstances.

ad cable. According to the Protest, this occurred before the steamer was seen; but that is a fact of very small consequence, and never can be considered as tending to shake the agreement, or to give the parties claiming a larger reward. The agreement was not, as has been truly observed, for an ordinary and common service; it was for a larger reward than would generally be paid for towing a vessel up to London. It may be that it is not a much larger sum; but it is a special agreement, in consideration of all the facts and circumstances, and the period of the year, which made it probable that bad weather might occur during the performance of that duty. I must say, that nothing of an extraordinary kind occurred on this occasion, and it would be exceedingly dangerous if I were to allow an agreement of this description to be broken, unless there were strong grounds for it. I, therefore, must pronounce that the tender of 50*l.* is a good tender; and as it has not been denied that 12*l.* for the cable is also a good tender, I must pronounce for that also. The owners of the *Betsy* must pay the costs up to the second tender, but I shall give them their costs after that period.

JULY 20.

The Betsy.

Proctors:—*Rothery*, for the asserted salvors; *Glennie*, for the owners.

JULY 25.

THE "TRUE BLUE."—*Act on Petition.*—This was a claim for a salvage remuneration for services rendered by the crews of six smacks to the *True Blue*, of 93 tons, laden with anchors and other articles of that description, which, proceeding from Aberdeen to London, on the morning of the 20th March, got upon the West Rocks, seven miles from Harwich. About seven or eight o'clock A. M., two boats, the *Sylvan*, James Cook master, and the *Aurora's Increase*, Edward Lewis master, came to her assistance, and, as they stated, made an agreement with the master of the *True Blue* to lay out an anchor, for the purpose of getting her off the rock, for £5, to which £1 was afterwards added, as a com-

Salvage.—An attempt by salvors to set aside an agreement, on the ground of its terms being misunderstood, — not sustained.

JULY 25. **pensation to Lewis for piloting the vessel into Harwich. The**
True Blue. **agreement was to this effect :—**

It is this day firmly agreed by James Cook and Edward Lewis with Robert Roberts, master of the *True Blue*, of Aberdeen, to assist him to get the ship off the West Rocks, and to the port of Harwich, if required, for the sum of six pounds sterling.

£6.

Jas. Cook,
Edward Lewis.

The wind increased before the vessel got off, and when this was effected, the services of four other smacks were accepted by the salvors—as a matter of necessity, as they stated, but, as the master alleged, contrary to his wish and in opposition to his remonstrances—and employed in rendering further assistance, and by the united aid of the six smacks, the vessel was brought safely into Harwich harbour at half-past one P.M. The sum agreed for, £6, was tendered, but the salvors contended that the agreement, under the circumstances, was not binding upon them, and that they were not aware of its effect.

Phillimore, D., and *Elphinstone*, D., for the salvors; *Sir John Dodson*, Q. A., and *Bayford*, D., for the owners.

JUDGMENT.

DR. LUSHINGTON.—If the facts accorded precisely with the representation made by the salvors, I should entertain no doubt whatever that the salvors would be entitled to a reward considerably higher than the sum tendered. I think that, though the vessel might originally have been, comparatively speaking, in no great degree of danger, yet that there was an increase of the wind, which would render it expedient, if not indispensable to her safety, that she should be got off the rocks without loss of time. On behalf of the owners, it is said that Lewis and Cook were the principal persons concerned, and that the master entered into a negotiation with them, whereby they undertook, according to the terms of the agreement, to effect the getting off the vessel from the rocks, and bringing her in safety to the port of Harwich. They say further, that the salvors, in performing the service, such as it was, did not conduct themselves with adequate skill; that there was no necessity

for the employment of the other four boats ; and that they were employed without the consent of the master, and against his will and repeated expostulation, by Lewis and Cook.

JULY 25.
—
True Blue.

The first consideration to which I must direct my attention is, as to the agreement itself. Now, I entertain no doubt whatever that an agreement can be made between a master and persons affording salvage services, provided there be a clear understanding of the nature of the agreement and the circumstances attending it; that it is made with fairness and impartiality to all, and that the parties to it are competent to form a judgment as to the obligations to which they are binding themselves; and I can entertain no doubt that such an agreement is a binding instrument, and not to be disturbed by this Court. I say this not merely upon the authority of Lord Stowell, cited in the case of the "*Mulgrave*,"* but because in all courts of justice, where parties are competent to bind themselves by agreement, and do bind themselves, it is held to be the duty of such courts to enforce such agreement. The real fact I have to try is, whether there was an agreement executed between these parties or not. But, before I consider that, I will look to the parties and their capability of entering into such a contract.

With respect to the master, it is clear that he was perfectly competent, acting on behalf of the owners, to enter into any *bond fide* agreement for the purpose of fixing the remuneration for the services he required. With regard to the salvors, I see no reason to suppose that they were persons so ignorant and uninformed as to their own interests as to be incapable of binding themselves by an agreement to which both of them appended their signatures. There was no such imminent emergency as to prevent time for due consideration. The weather was moderate when they came on board, and there was no circumstance to induce them to enter into the agreement without a just regard to their interests and the extent of the service to be performed. There can be no doubt that, of all persons in the world most competent to form an estimate as to the value of the service, they were the best able to do so. It is no argument against the

Competency
of the parties to
the agreement.

* 2 Hagg. A. R. 77.

JULY 25.

True Blue.

validity of a contract of this description that, in the first instance, it was entered into under an expectation that the service would be light, but that afterwards, in consequence of a change of weather or other circumstances, it became more onerous; because it is in the very nature of all agreements to take a fixed and given sum as a compensation for a given service, and the persons who enter into the engagement take the risk of any change of circumstances. For example: the master was bound to pay if the ship had instantly floated off, before it was necessary for the salvors to perform their part; and, on the other hand, supposing the agreement was duly entered into, the salvors were bound to fulfil it, though much greater difficulties might have been introduced into its performance than were contemplated.

The agreement not inequitable.

Upon these considerations, I come to the opinion that there was nothing inequitable or unjust in the agreement itself; because, if it contained any thing contrary to the principles of equity, no Court could be called upon to compel its fulfilment. But now, with regard to the agreement and the knowledge of its contents by the parties, and whether in point of fact it was *bond fide* entered into by all parties, and to the terms of the agreement.

Knowledge of its contents proved.

I find it is admitted on all hands that there are the signatures of these two individuals to the agreement itself, and I apprehend that, *primâ facie*, unless the contrary be proved, they must be taken to be cognizant of the contents of the instrument, and to have intended to bind themselves according to its tenor:—that is the natural presumption, and also the presumption of law. On the part of the master, David Bruce distinctly swears that the agreement was read over to the persons, and also read by them. I do not find on the part of the salvors any distinct statement or plea directly contradicting the averment that the agreement was read over. What is sworn is, that an agreement to that effect was read over to them. What effect? There was no other agreement, and if *this* was not read over, the inference is that the master, in reading over the agreement, stated what was false. It is impossible that I could, on a surmise of this description, attribute to the master an act of gross fraud.

These persons, who were cognizant of the whole transaction, do not negative the averment that either the document was read over to them, or that they read it themselves. But what is the probability? Is it probable that these two persons, being called upon by the master to execute a written agreement which so deeply concerned their own interest in the transaction, would be satisfied without either hearing it distinctly read over, or reading it themselves? Is it probable that they could have read it over and not understood it? But what is their statement? The statement made by the individuals, in the affidavits of the 10th and 19th of June, is utterly irreconcilable with the whole course of the transaction. Their statement is, that they signed an agreement for £5, simply for the purpose of laying out an anchor and getting the vessel off, and that, subsequently to the signing of the agreement, there was a discussion as to £1 being given to Edward Lewis for the purpose of piloting the ship into the port of Harwich. Why, it is manifest not only that this agreement contains nothing of the kind, but that the transaction never could have assumed such a shape, for it is to suppose that, after they had appended their signatures to the instrument, the master entered into a negotiation in the very teeth of his own signature: so that this averment is not deserving of the least attention at the hands of the Court. But there is another fact. Is it possible that any man signing such an instrument could not see the sum of money to be received?—that it was not £5 but £6? Before the signatures there is written “the sum of six pounds sterling,” and then in figures most clearly again, “£6.” Now, look at the tenor of the agreement, and see whether any mistake could occur. A clearer agreement, one more capable of being easily understood, I think seldom has been exhibited in this Court. And is it contrary to probability that they did understand it? Not at all, for this reason: the circumstances render it manifest that other smacks of the same description were coming up at the same period, and they wished at once to close the bargain and secure the job, and, the weather being moderate at the time, they thought they should get a sufficient reward for their services. I am of opinion that this

JULY 25.

True Blue.

JULY 25. is a binding agreement, and if so, I am bound to carry it into effect.

True Blue.

Agreement
binding on all
parties.

Now the question is, upon whom is the agreement binding? Undoubtedly, not merely upon those who signed it, but upon the crews of their vessels; the master is, for such purposes, their agent. I am of opinion, therefore, that I have no discretion but to reject the demand of these two vessels, their masters and crews.

Tender pro-
nounced for.
Costs.

With regard to the other vessels, by whom was it that they were employed,—and was their employment indispensably necessary? I must say, there is much in the statement of the salvors which excites considerable doubt as to the accuracy of the memory of the persons concerned in this transaction. In the first place, I think it is clear that these other salvors were engaged by Lewis and Cook, against the will and inclination of the master, and for the purpose of performing a service which Lewis and Cook, together with their two vessels, had undertaken to perform, and which I think they were competent to perform. I am of opinion, therefore, that these individuals, if they have any claim at all, must resort to those who employed them, and not to the owners of this vessel. Therefore, I pronounce for the tender made; but, under all the circumstances of the case, I shall not give costs.

Proctors:—*Fielder*, for the salvors; *Deacon*, for the owners.

JULY 27.

Collision.—
Owners of the
vessel causing
the damage ex-
onerated by rea-
son that the pi-
lot was solely
in fault, though
the master was
not compellable
to take one on
board.

THE "FAMA."—*Act on Petition.*—This was a cause of damage by collision. The brig *Emma*, 120 tons, on her voyage from Sicily to Southampton, with sulphur, having come to anchor in the outer roads of Falmouth, on the 25th of April, was run foul of, in mid-day, by the Russian vessel *Fama*, from Ivica to Elsineur, and suffered the damage sought to be recovered. The Russian vessel had a licensed Falmouth pilot on board, and the defence of the owners was, that the collision was either accidental, or occasioned by the fault of the pilot exclusively. The pilot made an affidavit, in which

he stated that his orders had been misunderstood by the master and crew, they being Russians; but the Court rejected the pilot's affidavit. The Trinity Masters, who assisted the Court, were of opinion (the Court concurring), that the collision arose from the misconduct of the pilot exclusively. The Counsel for the foreign owners submitted that, upon this finding, they were entitled to be dismissed; but the Court suggested whether the pilot was a licensed pilot within the Pilot Act,* and whether that Act applied to all licensed pilots; a point on which the Court of Queen's Bench and the Court of Exchequer were at variance. A copy of the pilot's license was produced; it was similar to that of pilots licensed under the 5th section of the Act, and it was regularly renewed from year to year. This question stood over.

JULY 27.

The Fama.

July 13.

PER CURIAM.—Two things are to be considered: first, July 20. whether the pilot was "duly licensed;" secondly, whether the master of the *Fama* was compelled to take the pilot under the provisions of the Act; or, if not compelled, he took him on board under such circumstances as will bring the case within the provisions of the Act.

Addams, D., for the foreign owners, said, it had been July 27. found that the pilot was actually licensed under the Pilot Act, and relied, for the exemption of the owners, upon the case of *Lucey v. Ingram*.† He was stopped by the Court.

DR. LUSHINGTON.—I need not trouble you; I am quite satisfied. The reason why I did not dispose of the case at the time the Trinity Masters attended me was, that I was not and could not be aware by whom the pilot was licensed. If he had been licensed by a corporation or a company, a difficulty might have arisen which the Court would, of course, have required time to consider, and to have had discussed; but it turns out that the pilot is licensed by the authority of the Trinity-House, in conformity with the Act, and that, at the time of the collision, he was actually within the waters for which he was licensed. These two facts being proved, the simple point is, whether the case does not fall

JUDGMENT.

* 6 Geo. 4, c. 125. ‡

!

† 6 Mees. & W. 302.

JULY 27.

The Fama.

Foreign owners
exonerated.
Costs.

within the authority of *Lucey v. Ingram*, by which it was determined that any pilot, acting in pursuance of the provisions of the Act, though not taken on board in consequence of any of the compulsory clauses, so misconducting himself in navigation, did not absolve the owners from responsibility for his misconduct. That was decided on a consideration of the whole statute, but especially with reference to the 72nd sect., which directs that every pilot licensed, or to be licensed, who shall, when not actually engaged in his capacity of pilot, refuse or decline, or wilfully delay, to go off to or on board, or take charge of, any ship or vessel wanting a pilot, and within the limits specified in his license, and of which he shall be qualified to take charge, shall be subject to certain penalties. The Court of Exchequer were clearly of opinion that, although it was not compulsory on the master to employ a pilot so circumstanced, yet, if he thought fit so to do, he was a pilot, according to the terms of the Act, acting in pursuance of the provisions of the Act, and consequently fell within the 55th sect. The principle on which they rested their decision was this—that it was exceedingly desirable, in cases where it was not expedient to compel masters of ships to take pilots, to encourage them to do so, for the general safety of navigation. This case falls within that construction of the statute, and therefore I pronounce accordingly, and exonerate the owners. I make no order as to costs.

Sir J. Dodson, Q. A., and *Bayford*, D., for the owner of the *Emma*.

Proctors:—*Gostling*, for the *Emma*; *Burchett*, for the *Fama*.

AUGUST 2.

Wages.—A
plea of forfei-
ture by abso-
lute or by par-
tial desertion,
—not sustain-
ed. — What
constitutes

THE "TWO SISTERS."—*Cause, by Plea and Proof.*—This was an action by John Hulton, second mate of the brig *Two Sisters*, to recover the balance of his wages, amounting to £28, earned by him on a voyage from Glasgow to Jamaica and back. On her return home, the vessel arrived at Cork, and thence sailed for London; but, owing to tempestuous

she made for Swansea, and arrived there on the 1st November, 1842, but could not enter the harbour till 10th. Here, it was alleged by the owner, Hulton was guilty of an act of desertion, by which he had forfeited his

share, D., for the mariner. Nothing is alleged against him till the 30th November, and his leaving the vessel, for a short time, to which he afterwards returned, is no desertion.

The *onus* is on the other side to prove desertion, and they have failed to do so.

share, D., for the owner. The mariner was absent from the vessel, without leave, for two nights, and the statute says that absence, without permission of the master, for any time, however short, under circumstances plainly shewing an intention not to return, shall be deemed an absolute desertion.

The COURT took time to consider the case.

Aug. 2.

Two Sisters.

"desertion,"
under secc. 7 &
9 of Stat. 5 & 6
Wm. 4, c. 19.

June 7.

ARGUMENT.

Cur. adv. vult.

DUSHINGTON.—The party suing, having been a sea-board this vessel, and having continued on board till his arrival in a port of this country, is, *prima facie*, entitled to his wages. The defence is, desertion at Swansea, after having been performed to the extent stated, and, if proved, the *onus* of proving the desertion lies on the defence, and, in fact, I have but one issue to try, namely, whether desertion, in its legal sense, and carrying with it the forfeiture of wages, is proved or not by the evidence in this case. I regret to say that the evidence is, perhaps, unusually, very deficient in precision, especially as regards the desertion, and is, consequently, in all respects unsatisfactory.

I will first consider the facts alleged on the part of the plaintiff, and the evidence he has produced. The first article of the plea admits that the vessel entered the harbour of Swansea, and was moored alongside the pier, on the 29th November; but it takes issue as to whether such was a safe berth or not. The second article alleges that, on the 1st of November, the master went on shore, giving notice that the crew should not leave the vessel, but that, at various times, in the course of that day, they did go on

Aug. 2.

JUDGMENT.

Facts in plea.

Aug. 2.

Two Sisters.

shore, leaving the ship in a state of danger. The article pleads that Hulton never came on board the day, the 1st December. The fourth pleads, that, at 10 o'clock A.M. on the 2nd December, the ship was from her moorings, and was not put into a place off till the evening; that, during the whole of that day, did not come on board, and that he was accordingly a deserter, and an entry was made in the Log, pursuant to the statute 5 & 6 Will. 4, c. 19, sec. 9. The fifth pleads that Hulton did not come on board for six days after. The rest of the Allegation relates to proceedings at office, and to certain charges of absence without Belize and Cork, which were not pressed in argument, which undoubtedly could not constitute a total desertion.

Whether they
constitute de-
sertion.

Now, the first question—assuming all the facts as pleaded—is, whether these facts do or do not constitute desertion, in the legal sense of the term. I may here observe that, the substance of the statements in this Allegation, extended in various articles, is, that Hulton quitted the ship on the 29th of November, and did not return at all for six days, or nine days. The first point is, whether this constitutes a desertion under the 9th section of the statute, which is here pleaded, because, as I have already observed, the article refers to the 9th section, and to the entry made in the Log, in pursuance of the directions contained in the statute. In the case of *M. Donald v. Jopling*,* the Court of Exchequer were of opinion that that section applied to cases where the ship was in foreign parts, and before her arrival at the port of delivery. This vessel, however, was not in parts beyond the seas, nor was she in the port of delivery. In a judgment deemed of so much importance, the question must have been carefully considered, and such judgment being the construction of a statute would be binding upon this Court, even if I took a different view of the statute, but my opinion coincides with that expressed by the Court of Exchequer. That opinion is stated by the Lord Chief

* 4 Mees. & W. 315.

(Lord Abinger), in these words:—"The 9th section is considered as applying to the case of desertion of a seaman whilst in foreign parts, and before her arrival at her port of delivery;" and in the judgment of the whole Court, the 9th section consequently does not apply to any act of desertion in a British port—that is to say, a port not beyond the coast. The words of the section are these: "That any seaman from the ship for any time, within the space of twenty-four hours immediately preceding the sailing of the ship, without permission from the master thereof, or any other period, however short, under circumstances plainly evincing that it was his intention not to return thereto, shall be deemed an absolute desertion." The Court of Exchequer held that these words were strictly confined to the conduct of a sailor prior to the ship having sailed for the port to which it was originally destined, and that the remainder of the section relates only to what was done in parts beyond the coast, and they held the 7th section to apply to cases of temporary desertion in other and different parts. The necessary consequence of that decision is, that it is impossible to say whether the present case is a case of desertion under the 9th section.

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Two Sisters.

The next point is, whether any other part of the statute applies to the present case. The 7th section imposes penalties for temporary absence, expressly declared not to be absolute desertion. The averment here is absolute desertion. It is clearly treated as such by the entry in the Log, and if such be the evidence, then this section may be laid aside out of the case, because it applies to temporary, and not absolute, desertion. There is, I regret to say, considerable ambiguity in this statute. I think that the 7th section, in fact, adverts to a species of desertion intended to be included in the 9th section, but which, in fact, is not, namely, a desertion in a British port, which is neither the port of shipment nor the port of delivery, nor a foreign port; and, on the whole, I come to this conclusion, that if the facts done constitute a desertion by the ancient maritime law independently of the statute,—which ancient maritime law I conceive, is not overruled by the statute, except in

Not an absolute desertion under sec. 9.

Whether a partial desertion under sec. 7.

AUG. 2.
Two Sisters.

the particular cases to which the statute exclusively applies,—I must pronounce for the forfeiture, the statute, in no degree, in my judgment, prohibiting me from so doing. Indeed, if the statute did prohibit me, what would be the consequence? That there could be no desertion in a British port, not being the port of shipment—a consequence so absurd and productive of so much mischief, that no Court would adopt such an inference unless absolutely compelled to do so by the imperative terms of the statute itself.

Intention absolutely to quit indispensable.

Now, the facts pleaded are, that the mariner left the ship without leave, and remained absent eight or nine consecutive days. If the facts are proved, I think they may constitute a desertion, if intention absolutely to quit can be inferred from the circumstances. But this I conceive is absolutely requisite, for otherwise the case would most clearly fall within the 7th section of the statute, which provides special penalties for absence during the voyage short of desertion. There can be no total desertion without an intention absolutely to quit, which is to be inferred from the circumstances. If there be absence from the ship with an *animus revertendi*, whatever may be the duration of this absence, that is provided for by the 7th section, and is punishable under the 7th section; it is not desertion forfeiting the whole of the wages. Then, with respect to the proof, not only does the ordinary *onus* lie upon the owner, but, in this case, the probability is against him; for it is not likely that a sailor, having nearly completed a long foreign voyage, would desert in a British port, when approaching the termination of his agreement, and so forfeit all the wages earned by his long labours.

The evidence.

I must now look to the evidence. I refer to that on behalf of the owners, and nothing can be more consistent with fairness towards them than, in the first instance, to judge them by their own testimony. The evidence consists of their depositions, in the first place, of three persons of the age of nineteen. M'Cutchin states that the ship was not in a state of safety; that Hulton did go on shore on the afternoon of the 30th of November; that he did not return on the 1st of December, following the plea; the same on

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Two Sisters.

to December 2nd; that Hulton came on board two or three days after the ship got alongside the slip where she was taken for repairs, and afterwards, took away his things; that, on the evening of the brig getting alongside the slip, the master broke his leg; that, on the next day, Hulton came on board—viz., the 2nd of December. Mullican's evidence is nearly to the same effect—not quite, because it is rather more in the direct terms of the Allegation; but he states that Hulton came on board twice, once several days after the ship was alongside the slip. The tenor of this evidence, as well as that of the preceding witness, is in support of the Allegation. M'Kenzie is exactly to the same effect. This evidence, therefore, would prove nothing as to whether the mariner went on shore by permission or not; it would prove that he did go on shore, and was absent about eight or nine days consecutively. Under such circumstances, if the case stopped here, I should be inclined to hold that the *onus* was changed, and that the mariner was bound to shew, having been absent for such a period, that he had gone with permission. But I will go into the remainder of the evidence. Mr. Davidson, the sole owner, has been examined. Now, I entertain very great doubt whether his evidence ought to be received. It is not necessary that I should decide that question, and I wish it not to be understood that I pronounce any opinion upon it one way or the other; but, for the sake of examining the whole of the testimony, I will advert to it. He is clearly an interested witness; and I cannot, at present at least, see that he can fall under the denomination of a necessary witness, not having been on board the vessel during the voyage. He says he came on board early on the morning of the 2nd December, "to the best of his recollection:" that is the way he expresses himself. Hulton was not on board that day, nor till the 7th or 8th of December, and then he told them that they (the seamen) had deserted the vessel. He says that Hulton made no application to return during the six days, and that, if he had done it, he would have received him. This evidence, to a certain extent, corroborates the testimony to which I have already adverted,

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but it states a fact not unimportant—that he (the owner) construed this absence to be a desertion, a total forfeiture of wages. Perhaps he was mistaken in his law, and acted towards the seamen on that supposition. The last witness is Pachorwood, a custom-house officer, and his evidence differs entirely from that of the preceding witness—he makes the mariner quit on the 29th of November, and return on the next day; and so throughout the whole of the transaction. After first stating that, on the 29th of November, Davidson, the master, told the chief mate that he was not to quit the ship, or allow the others to do so, the same evening, all the crew, except the boys, went on shore, and the second mate was among them; then he says, he does not recollect their names, and adds—“I cannot charge my memory that any of the crew left the brig on that day”—that is, the next day—“until about five o'clock in the afternoon, when they all went ashore again:” so that, according to this evidence, it would appear that, during the whole of the 30th of November,—which differs entirely from the other evidence,—these persons were on board. He says that, in the evening, after all this, the master and chief mate were together, and that “the chief mate had tea with him and me. After the master had gone on shore, about seven o'clock the same evening, Black, the chief mate, went on shore; only I and the three boys then remained on board the brig. The brig was then high and dry on the ground—in no danger at that time.” Here we have got the 30th of November, the men having come on board. On the 1st of December, Thursday—he states it explicitly,—the “second mate came up to the master, who was walking the deck, and asked him for his discharge.” Then he was on board on the 30th of November, and on the 1st of December. “The master, in reply, told him he could not give him a discharge, because he had himself taken it”—or, in other words, the master considered his being absent—twenty-four hours it had not been, for it was only during the night—to be an effectual and complete forfeiture. “Another mariner, who had on the same morning returned on board, came up to the master, and asked him to settle with him; upon which

the master ordered him to his duty. He ordered him to lean the outside of the ship. The man replied that 'he could be —— if he would.' After which, the man went ashore, as did also the second mate": that is on the morning of the 1st of December. "The steward also came on board on the same morning, but, as the others had done, afterwards left the brig. I believe that the master refused to receive them on board." Although his belief could not be direct evidence, the facts already stated are justification for the belief he did entertain, because the master told the man that he had already taken his discharge. His evidence with respect to Mr. Davidson, the owner, is very nearly the same. He says, "I cannot be certain as to the exact day, but on one day, and I believe the next day, after the brig had got alongside the ship, the second mate and another of the crew came on board, and asked Mr. Davidson, the owner, who was there, to settle with them. He, in reply, said that he had nothing to do with them. He said they were deserters." He proves that these persons had come on board on the following day, but not that they saw the owner; and during all this time the ship was in dock, the master disabled, and there is no evidence whatever to shew whether the owner, who had come down to Swansea, was permanently on board the vessel or not, to attend to any application made by persons, or to discharge the duties of master. There was a second master appointed, but when or how he took possession is not stated in any part of the case. There is the Log-book, and suppose I were to consider its contents as strict evidence, independently of all the rest, and entirely to be believed, what would be the effect of it? Why, it would prove nothing beyond this—namely, that Hulton quitted on the 30th November, and remained absent on the 1st and 2nd of December. If the Log-book were taken to be the only evidence, the case clearly comes within the 7th section, which imposes a penalty of so much for every twenty-four hours' absence. That would not prove in the slightest degree complete desertion, or, in the words of the statute, clearly shewing an intention never to return." But it is

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Arg. 2. impossible to reconcile the Log-book with the evidence of Pachorwood; for he states that they did return, in the very teeth of the Log-book. But there is another difficulty occurring here. The entries in the Log-book are not in conformity with what is required by the 9th section, which is the section that applies to total desertion; for it requires that the circumstances attending the desertion shall be entered in the Log-book at the time, and certified by the signature of the master and mate, or other credible witnesses. Now, there is no signature of the master, and in that respect it fails. With regard to the 7th section, perhaps it would be better that I should reserve my observations on that point, but there is a difficulty in saying that the entry is in conformity with the directions given in that section. Now, looking at the whole of that evidence, and viewing it in the strongest light for the owner, it only proves the following facts—that the mariners quitted without leave, and remained two days. This, therefore, would not be an absolute desertion, but the master construed it to be so, and he refused to give Hulton his discharge or to receive him back.

Result.

In such view of this case and this evidence, can I come to the conclusion that there was an entire desertion, *sine animo revertendi*? The case rather falls under the 7th section even in this *ex parte* view of it. The evidence in support of the claim is given by witnesses who are undoubtedly subject to great bias. The third witness is not a seaman belonging to the ship, but the keeper of a public-house, looking to this suit as the only chance for the payment of the debt due to him. Still, however, these witnesses—the other two being persons who expect to be paid if the present seaman succeeds—in one, and that a most essential particular, are entirely in unison with the evidence of the custom-house officer, produced on behalf of the owner. They all prove a return on board the ship on the 1st of December. I must say that, in my judgment, the evidence of the custom-house officer, coupled with the evidence of these persons, and the probability of the whole transaction, greatly outweighs the testimony of the three boys—no one

being of greater age than nineteen, and only swearing to this—not that the man did not come on board, but that they did not see him. Their evidence only goes to prove a negative; the evidence of the three persons, and of the custom-house officer, goes to prove an affirmative.

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I am of opinion, therefore, that, under the circumstances I have now stated, I cannot pronounce that there has been a forfeiture created by absolute desertion. I have had great difficulty as to whether I ought to go further in this case, and consider whether it falls within the 7th section of the statute, and mulct these individuals of a proportion of their wages, on account of their temporary absence from the ship; and my difficulty has in no degree been diminished, by two circumstances—first, that no reference is made in the pleadings to any temporary desertion; and, secondly, that it has not been contended for at Bar. In the case to which I have adverted—*McDonald v. Jopling*—the judgment of the Court was, that there had not been such a temporary absence as worked a forfeiture under the 7th section. I think that I cannot pronounce for a partial desertion in this case. It is possible, and I think most probable, that that is nearest the truth; but I think I cannot do it, for this reason—that, by the 7th section, the truth of the statement in the Log must be verified by a witness: “The entry shall specify truly the hour of the day at which the same shall have occurred, and the period during which the seaman was absent or neglected his duty; the truth of which entry it shall be incumbent on the owner or master, in all cases of dispute, to substantiate by the evidence of the mate, or some other credible witness.” Now, the other credible witness is Pachorwood, who signed the entry; but he does not prove the entry as a fact to establish the truth of the Log, as required by the statute. Pachorwood proves the direct reverse; for he does not prove absence on the 1st and 2nd of December, but presence; and it is impossible to reconcile his evidence with the Log.

No absolute
desertion.

Under these circumstances, therefore, I cannot even pronounce for a partial desertion. Though I may think that the

Partial deser-
tion not proved.

Aug. 2. seamen acted with extreme impropriety in the part they pursued, yet, as my judgment must be formed on legal grounds, *Two Sisters*. I am of opinion that I must pronounce in favour of the claim for wages, and of course with the expenses.

Proctors:—*Addams*, for the mariners; *Clarkson*, for the owner.

Claim by a Queen's ship to share as joint captor of a slave vessel with another Queen's ship, commanded by a superior officer, who had directed the vessel claiming to remain at anchor, — sustained. — Principles of joint capture. — Releasing witnesses. 1842. Jan. 28. **THE "SOCIÉDADE FELIZ."**—*Cause, by Plea and Proof*.— This was a suit between the officers and crew of H.M.'s sloop *Harlequin*, Captain Lord Francis Russell, and those of H.M.'s brigantine *Forester*, Commander Bond, to determine the right of the latter vessel to share in the proceeds of a Brazilian brigantine, named the *Sociéda de Feliz*, engaged in the slave-trade, and in the bounty. The slaver was descried by both vessels off Cape Palmas, and captured by the *Harlequin*, on the 21st of November, 1839, her commander having directed the *Forester* to remain at anchor and pick up the *Harlequin's* boats.

The facts of the case were stated in the report of the debate, on admission of the Allegation.* The cause now came on for final hearing.

1843. June 13. **ARGUMENT.**

Addams, D., for the *Forester*. The questions are, first, whether the *Forester* was not signalled by Lord F. Russell, when the prize was seen, and he was about to give chase, to remain behind, and whether this was not an order which Commander Bond was bound to obey; secondly, whether the *Forester* was at the time in a state and condition to join in the chase; and thirdly, whether she was in sight at the time of the capture. I submit that the affirmative of the three questions is proved by the evidence, and that the *Forester* has a right to share in the proceeds of the ship and the bounties on the cargo.

Robinson, D., on the same side.

Sir John Dodson, Q.A., for the *Harlequin*. It is said these ships were associated; they were so for the suppression of the slave-trade, but only for that one specific purpose; there was

* 1 Notes of Ca. 286.

not that intimate association which *per se* would give the *Forester* a right to share. There must be actual co-operation in the capture, or at least constructive assistance by intimidating the prize. The "*Aviso*."* [PER CURIAM.—Suppose the commanding officer of the *Harlequin* said to the *Forester*, "Remain at anchor till I come back;" what would be the consequence in law?] It may be a hard case, but Lord Stowell said, it is the first duty of an officer in the navy to obey the commands of his superior. The "*Financier*."† Lord Francis Russell had a right to distribute the vessels under his command as he pleased, and, though a hardship, it was Lieutenant Bond's duty to obey. [PER CURIAM.—Reverse the case, and suppose Lord Francis Russell had sent the *Forester*, instead of going himself, to make the capture: would he have been entitled to share?] But I submit that there was no intention or desire on the part of the *Forester* to join in the chase; her commander declared that the strange vessel was no prize. The witnesses on the part of the *Forester* are releasing witnesses, and their evidence cannot support a case of joint capture. The "*Fadrelandet*."‡ [PER CURIAM.—That rule cannot apply to joint captures of slave-vessels carried to Sierra Leone or elsewhere, for it would be impossible to examine any other witnesses. *Addams*.—In the "*Galen*,"§ which was a case of joint capture during war, the witnesses were releasing witnesses.] That case is an exception, where it was impossible to obtain any other evidence. The *Forester* was not in sight at the capture; but suppose she was, it is not an inflexible rule that a ship so circumstanced should share, and exceptions have been made. The "*Drie Gebroeders*."||

Bayford, D., on the same side, cited the "*Union*,"¶ and July 7. the "*Nordestern*."***

Addams and *Robinson*, in Reply, cited in addition the "*Vryheid*,"†† and the "*Forsigheid*."‡‡

* 2 Hagg. A. R. 31.

† 5 Rob. 120.

‡ 5 Rob. 339.

** Acton, 140.

‡‡ 3 Rob. 311.

† 1 Dods. 61.

§ 1 Dods. 429.

¶ 1 Dods. 346.

†† 2 Rob. 16.

Aug. 2. PER CURIAM.—I must of course take time to consider
Sociedade Feliz. my judgment.

Aug. 2.
 JUDGMENT.

DR. LUSHINGTON.—This vessel was condemned by the British and Brazilian Mixed Commission Court, at Sierra Leone, as engaged in the slave-trade, contrary to treaty; and a claim is now set up on behalf of H.M.S. *Forester* to share with H.M.S. *Harlequin*, the actual captor, in the moiety of the proceeds, and also in the bounty which is given by statute.

Principles to
 be applied to
 this case.

In the opinion expressed by Lord Stowell, in the case of the "*Aviso*," that the principle which governed cases of joint capture in the time of war should be applied to questions of this description, I have before declared my concurrence;* and I have no disposition, upon further reflection, to depart from that doctrine. But I am inclined to think, and so I conceive, from many expressions in the judgment of Lord Stowell, he thought also, that questions must arise to which the doctrine of joint capture in war could not be applied with the same rigid strictness. Between the two descriptions of capture, there will be found essential distinctions, which cannot be governed by the same rules. I am disposed to hold that, in some instances of the condemnation of slave-vessels, the rule, that a claim to share as joint captor should not be supported on releasing evidence alone, would not be fairly applicable. That rule could never have been fully established in cases of prize, unless, in ordinary cases of that description, other unexceptionable testimony could have been obtained—namely, the evidence of persons found on board the captured vessel. But in many cases of that kind—namely, of the capture of vessels illegally engaged in the slave-trade, where the condemnation takes place before a Mixed Commission Court,—it would be all but impossible to obtain the evidence of persons on board the vessel to support the claim of joint capture. The present appears to me to be one of those cases, and therefore I cannot sustain the objection, which was originally taken and pressed on behalf of the actual

Releasing
 evidence.

* See 1 Notes of Ca. 291.

captor—namely, that the case ought to fail, because the only evidence is that of releasing witnesses. I do not think that the reasoning on which I proceed requires authority to sustain it, because I think it is founded on the natural principles of justice and equity—namely, that you never can consider that as a *sine quâ non*, to enable a person to sustain a claim, which, according to the ordinary rules of possibility, he cannot perform. But if authority were necessary, I have no doubt that the case of the "*Galen*" fully supports the position I am now laying down. I do not see any material distinction between the case of the "*Galen*" and the present, and though that was an ordinary prize transaction, this case must be governed by the same principles in every respect.

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Sociedade de Felis.

There is another consideration which I think it convenient to advert to:—Was there on the present occasion any association between the *Harlequin* and the *Forester*; and if there did exist any such association, of what kind and description was it? I greatly regret that the case is left so bare of evidence on this point; for in the case of the "*Aviso*," Lord Stowell held, and that without any doubt or hesitation, that where vessels united together for the suppression of the illicit traffic in slaves, contrary to treaty, such a union was an association for a common purpose in the accustomed and legal construction of that phrase. The distinction between this case and that of the "*Aviso*," I presume to be (but really, under the existing circumstances, it is little more than guess), that, in the "*Aviso*," the *Bann* had the special orders of the Admiralty to put herself under the command of the *Maidstone*, and in this case there were no such orders. Both vessels,—the *Harlequin* and the *Forester*,—were furnished with special orders from the Admiralty to suppress the illicit traffic in slaves, but no other orders (according to the case laid before me) appear to have been given. It is stated to me, that Lord Francis Russell, as senior officer of the Sierra Leone division of the squadron on the western coast of Africa, commanded, but the most important point is entirely omitted to be stated, whether Lord Francis Russell, as senior officer on the station, had or had not the general

Whether there
was associa-
tion.

Aug. 2.
Sociedade Feliz.

Not proved in
its legal sense.

The facts.

Effect of order
to pick up
boats.

superintendence of the movements of the *Forester*, and whether she acted under his orders or not. There is, certainly, no evidence to substantiate the affirmative. Had such a fact been proved by evidence, I should have thought it fell within the legal definition of association, according to Lord Stowell's observations in the case of the "*Aviso*;" and such an association would have gone far to assist the case of the *Forester*. But no such association, no such union, is proved, and cannot assume it. I dwell more on this point, because, according to such knowledge as I have of the proceedings on that coast, the contrary is most probable, and I must, therefore, on this evidence, consider that they were two independent ships, both having the same purpose in view, but never associated for a common purpose; that, meeting accidentally, the senior officer would, as a matter of course, give orders for the time being in any accidental transaction, but that he would have nothing to do with the general control of the *Forester*.

Upon this basis, therefore, I proceed. The two ships were lying together off Cape Palmas; the captured vessel was seen from both; the *Harlequin* went in chase; the *Forester* did not. So far all is clear. Were any, and if any, orders given by Lord Francis Russell, as senior commander, to Lieut. Bond, who had the command of the *Forester*? Here is a very great conflict of evidence. On the one side, the *Forester*, it is said that orders were issued for her to remain at anchor till the *Harlequin* returned. This is on the part of the *Harlequin*; but Lord Francis Russell admits, and the evidence proves, that he ordered the *Forester* to remain to pick up his boats. Now, this order, in my opinion, is a most important ingredient in this case. If the order the *Forester* was bound to obey, and she did obey, what is the legal effect of such an order? Is it, or is it not, rendering assistance to the *Harlequin* towards effecting the capture of the vessel? Could the *Harlequin* have captured the vessel in chase, if the *Forester* had not been there, till she had picked up her own boats? I very much doubt the possibility of the *Harlequin* so doing; and indeed I think I am justified in coming to a contrary conclusion. If so, the effect of

as done by the *Forester*, in obedience to these orders, was to accelerate the operations of the *Harlequin*, and was a contribution, therefore, of some assistance towards the speedy raising and final capture of the prize. The order, so given by Lord Francis Russell, was not alien from the object held in view—namely, the capture of the vessel described. On the contrary, the order was auxiliary to that object, and the performance of the order was co-operative towards the proposed end. This case is, in this respect, widely different from that of a superior officer giving orders for a separate and distinct service, necessarily removing the ship far from the scene of operation. If to this circumstance there should be added proof of sight at the time of capture, and no impossibility on the part of the *Forester* of joining in the chase and capture, I am of opinion, that all these facts taken together would constitute a sufficient title for the *Forester* to share in the money to be distributed.

With respect to the question of sight, the important point which now arises is, whether the captured vessel saw, or could see, the ship claiming to share. This must necessarily be made to depend, where there is no testimony from the vessel seized, by the evidence. That the *Sociedade Felix* in the morning saw the *Forester*, I think there can be no reasonable ground to doubt. Mr. Marriott, a witness on behalf of Lord Francis Russell for the *Harlequin*, states that, even at the time of the capture, after a chase variously stated from one hour and a half to two hours and a half, the distance between the *Sociedade Felix* and the *Forester* was only from eight to ten miles. That the *Forester* saw the *Sociedade Felix* is beyond all dispute; and though there might be some greater difficulty in the *Sociedade Felix* seeing the *Forester*, from circumstances mentioned in the evidence, yet I think there is sufficient ground to conclude that the *Forester* was seen, or might have been seen, from the ship seized at the time of the capture, and I think this is sufficient where sight at an early moment is established. I do not say that, under circumstances as I have stated, it is absolutely necessary that sight at the moment of capture should be proved. I greatly doubt the necessity of maintaining even that position; I am in-

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established.

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Sociedade Feliz.

clined to think that it is not necessary where detention in the service of the actual captor is completely proved.

Forester in a
condition to
assist.

It has been further contended that, from the disabled state of the *Forester*, and the sickly condition of the crew, she could not, had her commander desired it, have prosecuted the chase. I think this averment is not supported by evidence, but, on the contrary, that the *Forester* was not disabled; that she was lying at single anchor, with a number of persons on board composing the crew, not sick, but in health, amply sufficient to have enabled her to make sail, and to have effected this capture, had it been requisite that she should have proceeded in the chase, and had she not had the orders I have specified from Lord Francis Russell.

There remains one other point—namely, the alleged declaration of Lieutenant Bond, that the vessel seen was not a slave-ship and not a prize, and from whence it is contended that he could have had no intention to chase, and that the absence of such intention would defeat the claim of joint capture. Assuming the fact to be, that he made such a declaration, I am not of opinion that such a declaration, made under the circumstances of this case, after the order to pick up the boats, could work the effect sought to be ascribed to it. The declaration does not alter the fact, and the expression of such an opinion does not shew absence of the *animus capiendi*. In such instances, where vessels of such a description are seen, even if an officer should entertain such an opinion, it does not render it less the duty of that officer to ascertain the fact.

Entitled, under all the circumstances, to share.

I have not attempted to reconcile the discrepancy of the evidence with respect to the times of the different parts of the transaction, or with respect to other matters. I confess I should despair of doing so satisfactorily, were it absolutely necessary to found my judgment on these points. My judgment will be founded on the facts which I consider to be established by the evidence on both sides. I hold the *Forester* entitled to share, on a consideration of all the circumstances combined. I say nothing of what my decision would have been had one of these circumstances been wanting. I say “all the circumstances combined,” by which I

ean, not association or union, but the circumstances of both vessels being on the coast together, having the same object in view, Lord Francis Russell being the senior in command ; orders being given to the *Forester* by Lord Francis Russell and obeyed by her commander, and the circumstance of right being proved to the extent I have stated ;—it is upon the union of *all* these circumstances that my judgment is founded, and not upon one or more of them.

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But, before I conclude, I must guard myself against being supposed to have pronounced any opinion upon one point raised in the Argument—namely, that the *Forester* was bound not to chase without an order from the senior officer ; that no such order was given, and that, therefore, she ought to share, remaining at anchor, as it were, from compulsion, in the absence of orders. What would be the case, if two of Her Majesty's ships were in company, and the senior officer thought fit to chase a suspicious sail, which afterwards became a prize, preventing the other ship from joining in the chase by not giving an order, I am not in this case called on to determine, and I give no opinion upon it whatever. I am exceedingly desirous that it should be distinctly understood that that is a point which I consider should be fully open to discussion upon any future occasion, and that I do not in any degree pronounce a judgment upon it.

In this case, for the reasons I have already stated, I am of opinion that the *Forester* is entitled to share in the proceeds and bounty with the *Harlequin*. I think the expenses of both sides should be paid out of the proceeds. It was a question requiring very deliberate consideration.

Proctors:—*Nelson*, for the *Harlequin*; *Rothery*, for the *Forester*.

Prerogative Court of Canterbury.

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Capacity. — **MUDWAY AND SMITH, EXECUTORS OF MUDWAY, DEC.**
 A will of a person of eccentric habits, occasionally insane, and ultimately found to be permanently so, executed in lucid intervals, — pronounced for.
v. CROFT, COMMITTEE OF WICKS, A LUNATIC.—CASE.
 —This was a suit respecting the will of Anne Wicks, spinster, who died 17th June, 1841, aged seventy-two years, leaving personal property of the value of about £80,000, and a real estate of about £900 a year. The will was propounded by Sir Archer Denman Croft, Bart., the Committee of the universal devisee and residuary legatee (Richard Wicks), a lunatic, and opposed by Mrs. Elizabeth Mudway, widow, cousin-germane and only next of kin of the deceased. Mrs. Mudway having died during the suit, it was carried on by her representatives, Messrs. Mudway and Smith. The heir-at-law was a cousin of the deceased, William Wicks, elder brother of the devisee and legatee. The deceased at her death was a lunatic, having been found by an Inquisition from the Court of Chancery, executed in 1840, to have been insane, without lucid intervals, since 1st December, 1839. Besides the will in question, which is confined to her personal property, she executed, on the 8th August, 1833, a will, prepared by her solicitor, and attested by three witnesses, which is limited to her real estate, the purport of which is to give that estate for life to her cousin, Richard Wicks, and at his death, to his eldest son absolutely. The paper in question, which is in the deceased's handwriting, consists of two sheets stitched together, one within the other, the upper part of the first leaf being cut or torn off, leaving on the reverse side the appearance of ends of letters. The bequests are in separate memoranda, divided from each other by lines, and beginning at the foot of the first page, the upper part being removed, viz.—

The will of 1830. I give £500 to the person that keeps these memorandums to be paid within six months after my decease duty free ANNE WICKS.
 [Then, on the lower part of the other side, the upper part being cut off,]

I give to the Vicar of Frampton on Severn £100 if he preaches a Sermon at my interment from the following words I quits it all without a tear nothing in this Life worth regarding did I ever see to be paid within one month after my Decease Legacy duty free—Residue and Remainder to [“my surviving heir at Law,” erased] Rich^d. Wicks.

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ANNE WICKS.

Belle Vue Place,
Decr. 10, 1830
Cheltenham.

I desire to be buried handsome in my Chancel at Frampton on Severn in the County of Gloucester as near to my Father as possible and desire that a Monument may be erected in the Chancel value £500.

I give £1000 to be laid out in Communion Plate for the Church of Frampton on Severn and £50 for a Damask Cloth for the Table—Legacy Duty free.

I give my Bank Stock to the aged Poor of the Parish of Frampton on Severn in the county of Gloucester Legacy Duty free the Interest to be divided annually on the 23^d day of April (being the day on which I was born) by my Heir at Law in succession or the Vicar of the Parish.

I desire that such a Tablet may be erected in the Chancel where I am to be buried as I have had erected in the other for my Cousin Legacy

I give £500 Legacy Duty free to improve the Church of Frampton on Severn and £500 to rail the Church Yard with Iron rails my Heir at Law and the Vicar of the Parish to direct in what manner its to be done

I direct that my Wearing Apparel may not be given to any servants nor my Linen

ANNE WICKS.

This paper (it was pleaded) was delivered, with the will of 1833 and other papers, by the deceased to Mr. John Brand Winterbotham, her solicitor, on the 17th December, 1839, in whose custody it remained till her death (as he deposed), in the same plight and condition as when received by him from the hands of the deceased.

Aug. 8. The ground of opposition to the will was, that the deceased was, at the date of it, of unsound mind. It was admitted that, in 1826, and in 1829, for certain periods of time, she was insane, and that, in December, 1839, she again became insane, and so continued till her death.

March 3rd, The case was argued at great length in the sittings after
6th, 8th, 14th, Hilary Term: *Sir John Dodson*, Q. A., and *Jenner*, D., for
and 17th. the Committee of the residuary legatee, in support of the will; *Addams*, D., and *Deane*, D., for the executors of the late next of kin, in opposition to the will.

Aug. 8. **SIR H. JENNER FUST.**—In this case, the party supporting
JUDGMENT. the will contends that the deceased was at all times, with certain exceptions, of sound mind, and the other party maintains that, during her whole life, before and after the date of the will, she was in a state of insanity; the Court, therefore, is bound to look at the whole of the case, and to consider carefully the evidence on both sides.

Facts admitted. Now, there are certain facts which are not in dispute, or are too clear to admit of any question—namely, that the paper is in the handwriting of the deceased; that at three periods of her life,—in 1826; from November in 1829 till February 1830, and in 1839,—she was decidedly insane, and that she continued so from the 1st December, 1839, till her death in June, 1841. The question is, what was her state and condition in the intervening periods, more particularly between February, 1830, and the 10th of December in that year. It is contended that, though the deceased was exceedingly eccentric, her eccentricities may be accounted for by the circumstances of her life and the manner in which she was brought up. It is necessary, therefore, for the Court to look at the early history of this lady.

History of deceased. It seems that she was the only daughter of a clergyman of the Church of England, the Rev. John Wicks, of Frampton Cotterill, Gloucester, who died when the deceased was about seven years of age. On the father's death, the mother and daughter resided together till the death of the mother, in 1805, the deceased being at that time about thirty-six, a period of life when the manners and habits are supposed to

e formed. The mother was a woman of close and penurious habits, and they lived secluded from all society. After her mother's death, the deceased continued the same mode of life, and she also contracted habits not unusual with persons who live in seclusion, such as talking and muttering to herself, pacing up and down the room, holding imaginary dialogues, and other acts of that kind, which would induce many to believe that persons so acting were crazy or insane, whereas they may be in the entire possession of thought, judgment, and reflection, and not disqualified from executing any act of business affecting their property. And it appears that this lady, during her whole life (with the exception of the periods referred to, in 1826, 1829, and 1839), was in the full possession of her property, managed her own domestic concerns, purchased (in 1823) an estate for £8,900, corresponded with her bankers, directed the investment of her money, received her rents, and executed deeds and leases. In August, 1829, shortly before the second period when she became decidedly insane, she executed a deed of trust, whereby she divested herself of £1,000, which had been bequeathed to her by a relation, in favour of the poor of the parish of Frampton on Severn, of which she was propriess and patroness of the living. She hired and discharged her own servants, and paid them their wages; and, according to the evidence, she evinced considerable quickness and acuteness in money transactions and acts of business. Under these circumstances, if there was nothing more in the case, the Court would find great difficulty in pronouncing a person who had so conducted herself, and so managed her affairs with prudence and discretion, incapable of disposing of her property by will. But it being admitted that, at particular periods, the deceased was not merely eccentric, but decidedly insane, and that, a few months before the date of the will propounded, she was on one occasion under personal restraint, and laboured under great excitement and insane delusion, a question arises whether that excitement and delusion continued or was completely subdued, and the deceased was restored to full ability to perform acts of business. And this question gives rise to great difficulty, to

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distinguish between great eccentricity and unsoundness of mind—a question which this Court has at all times found it extremely difficult to deal with—and it is more particularly so in a case of this description, where eccentricity always existed, and at certain periods it is clear the deceased was of unsound mind.

Rules and principles applicable to these cases.

It has been frequently attempted to lay down some rule of general application to all cases of this kind; but it is found impossible to establish one general rule applicable to all cases, since in each case the question of sanity or insanity must depend upon and be governed by its particular circumstances. In *Dew v. Clark*,* this subject was very fully discussed, and an opinion was given by my learned predecessor in this chair, in a most elaborate judgment, that, where there is delusion of mind, there insanity exists. But in that case, and in *Cartwright v. Cartwright*† and *Groom v. Thomas*,‡ the Court was not satisfied with the fact of delusion, as sufficient proof of insanity to avoid the act, but entered particularly into the life and history of the deceased. All these cases, therefore, shew that the Court must look at the whole circumstances of the case, to judge what was the real character of the deceased, with reference not merely to the particular act, but to all the intermediate stages of her life. The difficulty of laying down any general rule in these cases is felt, not only by courts of justice, but also by writers of the medical profession who have directed their investigations to questions of insanity. Dr. Ray, in a work published a year or two ago,§ in treating of this question, says: ||—

So closely are soundness and unsoundness of mind allied, that we are met at the outset by the difficulty already hinted at, of discriminating in some cases between mental functions modified by disease, and those that are peculiar, though natural, to the individual. Madness is not indicated so much by any particular ex-

* Rep. published by Dr. Haggard, 1826.

† 1 Phill. 90.

‡ Hagg. 433.

§ *On the Medical Jurisprudence of Insanity*. Boston, U. S., 1835. Reprinted, Edinburgh, 1839.

|| Ch. v. § 92, 93.

avagance of thought or feeling, as by a well-marked change of character, or departure from the ordinary habits of thinking, feeling, and acting, without any adequate external cause. To lay down, therefore, any particular definition of mania founded on symptoms, and to consider every person mad who may happen to come within the range of its application, would induce the ridiculous consequence of making a large portion of mankind of un-sound mind. Some men's ordinary habits so closely resemble the behaviour of the mad, that a stranger would be easily deceived;

in the opposite case, where the confirmed monomaniac, by carefully abstaining from the mention of his hallucinations, has the resemblance of a perfectly rational man. Hence, when the sanity of an individual is in question, instead of comparing him with a fancied standard of mental soundness, as is too commonly the custom, his natural character should be diligently investigated, in order to determine whether the apparent indication of madness is not merely the result of the ordinary and healthy constitution of the faculties. In a word, he is to be compared with himself, not with others; and if there have been no departure from his ordinary manifestations, he is to be judged sane, although it cannot be denied that striking peculiarities of character, such as amount to *eccentricity*, furnish strong ground of suspicion of pre-disposition to madness.

This is the rule which this gentleman lays down as to the proper test to be applied in such cases—namely, that an individual must be compared with himself. He then cites the following passage from Dr. Combe's *Observations on Mental Derangement* :—

“ In investigating the nature of insanity, the first caution to be observed is not to confound disorders of mental functions with natural qualities which sometimes strongly resemble them. Many men in the full enjoyment of health are remarkable for peculiarities and idiosyncrasies of thought and feeling, which contrast strongly with the general tone and usages of society; but they are not on that account to be held as insane, because the singularity by which they are distinguished is with them a natural quality, and not the product of disease; and, from the very unlikeness of their manifestations to the modes of feeling and acting of other men, such persons are, in common language, said to be eccentric. It is true that, on the principle already explained, of excess in the use of some organs over the rest being favourable to the produc-

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tion of insanity, eccentricity involves, all other things being equal, a greater than usual susceptibility to mental derangement; but still it is not mere strangeness of conduct or singularity of mind which constitutes its presence. *It is the prolonged departure, without an adequate external cause, from the state of feeling and modes of thinking usual to the individual when in health, that is the true feature of disorder in mind;* and the degree at which this disorder ought to be held as constituting insanity, is a question of another kind, on which we can scarcely hope for unanimity of sentiment and opinion. Let the disorder, however, be ascertained to be morbid in its nature, and the chief point is secured, viz.—a firm basis for an accurate diagnosis; because it is impossible that such derangement can occur unless in consequence of, or in connection with, a morbid condition of the organ of mind; and thus the abstract mental states, which are justly held to indicate lunacy in one, may, in another, speaking relatively to health, be the strongest proofs of perfect soundness of mind. A brusque, rough manner, which is natural to one person, indicates nothing but mental health in him; but if another individual, who has always been remarkable for a deferential deportment and habitual politeness, lays these qualities aside, and without provocation or other adequate cause, assumes the unpolished forwardness of the former, we may justly infer that his mind is either already deranged, or on the point of becoming so. Or, if a person who has been noted all his life for prudence, steadiness, regularity and sobriety, suddenly becomes, without any adequate change in his external situation, rash, unsettled, and dissipated in his habits, or *vice versa*; every one recognizes at once these changes, accompanied as they then are by bodily symptoms, as evidences of the presence of disease affecting the mind, through the instrumentality of its organs. It is, therefore, I repeat, not the abstract act or feeling which constitutes a *symptom*; it is *the departure from the natural and healthy character, temper, and habits, that gives it this meaning*; and in judging of a man's sanity, it is consequently as essential to know what his habitual manifestations were, as what his present symptoms are."

Such, therefore, being the rules and tests, according to a writer of high authority in mental disorders, which are proper to be applied in order to discover whether or not the eccentricity of an individual amounts to unsoundness of mind, and thinking them founded in good sense and sound observation, the Court will proceed to consider the "habi-

tual manifestations" of this lady, and to compare them with her manifestations at other times, when it is admitted that they assumed an insane character, and to apply the test to what occurred during the intervals between such periods of time, when it is contended that she was restored to her usual character, and was consequently competent to do any act binding on herself and others.

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The evidence respecting the early stages of the deceased's life shews that, after the death of her mother, she continued to reside at Gloucester; that she lived in a very penurious way, was eccentric in her manners, dressed oddly, and had "an odd way with her," which led to her being called "Cracky Wicksy;" but the witness who says this adds, "to talk with her, she was as rational as any other woman;" that she was sharp and quick after her own interest, and had a good memory; that she had a habit of muttering to herself, walking up and down the room, talking to herself, and holding imaginary dialogues with persons, speaking and curtseying to the wall; that she complained that her mother had behaved ill to her in keeping her so strict. But the two witnesses who knew the deceased in early life, before and immediately after the death of her mother, did not consider her of unsound mind. Mr. Clifford, a gentleman of fortune, who held some corn-rents of the deceased, mentions her habit of muttering, "as if she was speaking her thoughts to herself;" and it is not uncommon in persons brought up in seclusion to be addicted to thinking aloud, giving utterance to their thoughts, which might lead those who are not acquainted with them to believe that their minds were unsound. Mr. Read, who knew the deceased from 1811, says, "she was always from the first one of the most strange women I ever saw in my life; there was always, I thought, a species of insanity about her, to a greater or less degree. Her dress was different from any one else's, and so was her manner and conversation. She was always fidgetty and restless, never satisfied with any thing or anybody; she had a peculiar habit of talking to herself, all which tended to give her the look of a mad woman." But he says, on interrogatory, that she managed her own affairs, and, except at

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the periods when she was "downright mad," had always sense enough to protect her own interests, and was particular in the payment of her bills, though there was always, he thought, "a species of insanity about her." Mr. Smith, a solicitor at Gloucester, was employed by the deceased from 1823 to 1829. He lived next door to her, and she used to be frequently backwards and forwards visiting at his house till she removed to Cheltenham in 1826. The first act of business he did for her was purchasing an estate for £8,900. He says she was always a person of very penurious habits; that she lived very secluded, and her manners were odd and singular, not more so, however, he says, than might be accounted for by her way of living: "by living to herself so much, she had acquired an asperity of manner, and when she was irritated she was rather testy; she would mutter to herself in an odd way; but I have noticed the same in persons of whose sanity no question was ever entertained. She was, however, very acute, especially in money matters, and was perfectly aware of her rights both as regarded her real and her personal estate." The same account is given by other witnesses. From 1823, when he purchased for her the estate for £8,900, he was employed by her in other smaller purchases, and in these and other transactions he "received all necessary and usual directions and instructions from herself, as any other person of undoubted sanity, and he acted according to her instructions." And her prudence and discretion in managing her estate are proved by the increased value of her property at her death. This witness was not employed by her after 1829 till April, 1838, and he continued to be employed till December, 1839, when he witnessed a variety of absurdities and inconsistencies in the conduct of the deceased, which he had never observed before.

From the evidence of these and other witnesses, I think it is quite clear that, up to a certain period, the deceased was quite capable of making a valid disposition of her property. Nobody seems to have quarrelled with her application of her property, or with any purchase or disposition by the deceased during her life up to the year 1826, and it is difficult to say,

if she was permitted, and believed competent, to do acts of this description, that she was not capable of making a will.

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But in 1826, a very material change takes place in the condition of the deceased, for then it is admitted that she became decidedly insane. This change is spoken to by her female servant, Williams, who lived with her from shortly before Christmas, 1826, till 1830, including both periods of time when she became insane. Williams says that she had not lived with her a week before she felt convinced that the deceased was not right in her mind, and she never thought her otherwise the whole time she lived with her. "She had a number of most extraordinary fancies, such as none but a mad or crazy person could have; if ever I saw a crazy person," the witness says, "she was one. She was a deal worse at times than at others, especially when she had a bad cold in her head; she would generally then be very *affectionous* in her head." Then she speaks of the extraordinary fancies she had at this time (1826),—of her being pregnant by medicine administered to her, and of the Bishop of Gloucester being attached to her. At this time (1826) Dr. Shute was called in to attend the deceased, but as he treated her fancies with ridicule, he was dismissed by her after two visits, and we have no further evidence from him till he attended her again in 1829. But he is of opinion that she was in a state of insanity when he saw her in 1826 greater than in 1829.

It seems from the evidence of Williams that, after her convalescence in 1826, her habits were very much of the same character as before, in pacing up and down the room, muttering to herself, clapping her hands, stamping with her feet; but still there was no particular delusion till shortly before she was removed to Gloucester, in November, 1829. During the interval, she had the complete management of herself and her affairs, and transacted matters of business of importance requiring consideration. In August, 1829, she executed a deed, conveying £1,000 to trustees for the benefit of the poor of the parish of Frampton-on-Severn, and amongst the witnesses is Mr. Bonner, a solicitor, at

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Gloucester, who was employed by her for a considerable time. Mr. Bonner says she first employed him in 1825, and continued to do so, with an intermission, till 1829, in various professional matters, principally referring to the management of her estate, and he says she was a very strange woman; that there was a strange manner about her, and a degree of eccentricity beyond what he had ever witnessed in any one. But he says:—

“I transacted business with her up to within a very short time preceding November, 1829. I held a Court for her in the latter part of the preceding October, and this I should not have done, of course, had I looked upon her as an insane person, or crazed to the extent of incapacitating her for the transaction of business. There was a considerable shrewdness about her in such matters, more especially as regarded her own interests; but it was so intermixed with eccentricity and strangeness of conduct, that it was at all times more or less difficult and disagreeable to do business with her, and at times I found it impossible to get on with her, and was obliged to defer the business till she should be in a more fit state of mind. Very constantly, in the midst of discussing any matter of business with her, she would abruptly break off from the subject we were upon, and get up and pace up and down the room in a hurried manner, and begin muttering to herself in an incoherent and unintelligible manner, as if addressing and holding conversation with persons who were not present. She would talk at these times with a strange energetic manner, using a great deal of action, shaking her finger, and sometimes stamping with her feet, or clapping her hands, and, frequently after, she would as suddenly resume her seat and attention to the matter in hand, as if nothing had happened. Frequently, in the midst of business, she would break off suddenly, and get up and go into the corner of the room, and make a profound obeisance or curtsy, as if to some one, and otherwise conduct herself in similar strange and extraordinary modes. She appeared at these times to be labouring under some delusion, the nature of which was unintelligible to me.”

Nevertheless, he says, she managed her own affairs, was well acquainted with her own rights, and ready to take any necessary steps to protect her own interests therein. He speaks to the execution of the deed of declaration of trust in August, 1829, which was prepared by Mr. Smith, but

was executed in presence of Mr. Bonner, vesting £1,000 in trustees for the benefit of the poor of the parish of Frampton-on-Severn. It was the amount of a legacy bequeathed to her under the will of her cousin, Mr. Ellis, which she told Mr. Bonner, at the time she executed the deed, she would not receive, and she gives a reason: "She would not have any of her cousin's money, she told me; I believe she was offended at the legacy being declared in Mr. Ellis's will to be in lieu of her claims as his heir-at-law." Now, here is a transaction of considerable magnitude and importance, for which, as Mr. Smith proves, he received instructions for the preparation of the instrument from the deceased herself. Though her behaviour, therefore, may have been eccentric, odd and ridiculous,—even absurd;—though she may have been silly and weak; she was not guilty of any act of insanity at this time, and was not considered by Mr. Bonner as insane, or he would not have suffered her to execute this deed; and although Mr. Bonner may *now* be strongly impressed, from what has transpired since, that she was of unsound mind at that time, I cannot but think that he did not *then* (in August and October, 1829) consider her otherwise than of sound mind.

In the intermediate time between 1826 and October 1829, then, looking at the acts of business she performed under the superintendence of her solicitors, it is difficult to contend that a will executed by her could not have legal effect, there being nothing to impress the Court with a notion that her habits and condition of mind were other than they had been during the earlier part of her life, and the time when the Court is of opinion that she was competent to acts of business.

In November, 1829, she had another attack of her disorder, which is spoken to by Mr. and Mrs. Read, and by Williams, who declare the deceased's conduct to have assumed the character of decided insanity. Williams, who had deposed to her conduct in 1826, says she recollects one night (at the end of 1829) that the deceased had a fancy that King George was coming to sleep at the house, and had her bed prepared for the purpose, and wax candles put in her bed—

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Wilton, and Dr. Fletcher. She so continued till February 1880, and clearly was in a state of decided delusion on talking of things that had no real existence, pointing to pictures on the wall, and so on. Mr. Bonner has been informed as to her condition at this time, and he says, that on his arrival at Cheltenham (where the deceased then was), he was sent to the Lunatic Asylum, to have his judgment on the state of the deceased, and he expressly says, he found her "in a very different state from what he had ever seen in ; she was in a very wild and disordered state of mind, her manner was very bold and incoherent, and she kept exhibiting the most grotesque grimaces ;" and he came away with the full impression that she was insane.

Of the medical witnesses,

Whilst she was at Gloucester, in January and February 1880, she was visited by the four medical men, who gave their opinion as to her condition, not only then, but after she returned home to Cheltenham, for according to some of the witnesses she was then still labouring under some of the delusions exhibited at Gloucester. Dr. Shute was the person to whom the care of the deceased seems to have been more particularly intrusted. Dr. Hitch occasionally attended her as her medical attendant, but as the physician of the Lunatic Asylum, to superintend the conduct of the nurse, who had recommended ; and, as he says, partly from a natural curiosity, he noticed the symptoms of the delusion. Dr. Shute says he found her labouring under a decided delusion of mind upon one point ; the former delusion no longer existed ; but he considered her insanity as

as far as I could perceive, no delusion except on one . On all other subjects she talked and discoursed raly and sensibly. Whilst so under my care she reco- from that delusion. It was with my sanction she red to Cheltenham ; I considered her then recovered." on interrogatory, he distinctly states that, at the time r return to Cheltenham, in February, 1830, she was state of sanity, and competent to any act of business." Hitch differs in some respects from Dr. Shute, as to tent of the deceased's delusions ; he says that her mind enerally insane, though the predominant delusion may been confined to one particular subject. He says:— general conversation was at these times very incohe- added to which, there was great physical excitement, enerally restlessness of deportment under the treat- to which she was subjected. Under Dr. Shute's man- ent, the deceased, after a time, became more tran- her conversation had no longer relation to what had the predominant impression of her mind," namely, e Bishop of Gloucester had been making undue ad- s to her. He can recollect no other delusion under she laboured, but "her mind was evidently generally ed." He says the deceased, the last time he saw her us to her return home, in February, 1830, had not knowledge been pronounced by Dr. Shute to be of mind ; but Dr. Shute says she had recovered. "I ot so consider her," Dr. Hitch says ; "for, although ently she was no longer the subject of any delusion, still remained some confusion of mind, and a partial ility, which I considered would (as afterwards proved the case) eventually lapse into fatuity:" this prophecy ot, however, fulfilled till nearly ten years after, and itch, in 1836 and 1838, negotiated with her, and took a lease of some land.

vidence of the other medical witness, Mr. William 1, son of Dr. Wilton,—who attended the deceased when oured under the particular delusion to which I have ed,—carries it somewhat further. Mr. Wilton says, he s looked upon the deceased as crazy or insane. He

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says that he attended her when she was under restraint at Gloucester in 1829 and 1830, but he ceased to visit her after the 10th February, 1830, when she returned to Cheltenham. She had then become more calm and manageable; "but so far as my recollection serves me," speaking, therefore, with diffidence, "there had no improvement otherwise taken place in the state of the deceased's mind—I am sure that none had taken place as regarded the delusions under which she had been labouring; they continued, I know. She had not become, nor was considered or pronounced by myself or, as I believe, by either of the other medical men attending her, to have become, of sound mind. Her delusions continued as before. Our attendance ceased merely, to the best of my knowledge, because it was proposed to remove the deceased, or to put her under other care." Mr. Wilton, therefore, differs from Dr. Hitch and Dr. Shute, for, according to him, the deceased's delusions "continued as before," yet she was suffered to go home; and it is impossible that, if she had been in that state, she would have been suffered to return without a person to take care of her, whereas she returns with Elizabeth Williams only. Ward, the nurse, states that she was suffered to return home because she had been made calm by threats of sending her to the Lunatic Asylum, and that it was only on that ground that Dr. Shute permitted her to return to Cheltenham. But this very witness, Ward, states that she prevailed upon the deceased to conceal her symptoms of insanity from the medical attendants, by threats of sending her to the Lunatic Asylum; that she did conceal them, and therefore, this woman must have been a party to the deception. And Mr. Wilton must have been a party too. But can I suppose that Dr. Hitch and Dr. Shute could have been so deceived? Dr. Shute had shewn previously that he was not liable to such deception, and I cannot think that he is a person who would have permitted the deceased to return home till a cure was effected, or that she could have been considered insane at the time of her return—an opinion which is confirmed by the conduct of Mr. Bonner, who, being her confidential solicitor, had taken the care and

custody of her property and affairs, and upon her return home, he gave up the charge to her, though he did from that time consider that her mind and intellects were not what they had been, especially as to money matters. He says that Mr. Fletcher was of opinion that she was well enough to go back.

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But it was evidently rather in accordance with my wish on the subject, and the deceased's own repeated desire, than any opinion that she had recovered her faculties, that the permission was given. She was latterly, before she left Mr. Wheeler's, more like herself, more restored to what she had been previous to her attack; but it was evident that she was nothing like the woman she had been; she had evidently become much more weak in intellect. From that time, with the decay of intellect which she exhibited, I should have hesitated bringing an action, or preparing a deed, or doing any important matter of business for her, without taking means, through her medical man, or otherwise, of ascertaining that her mind was competent to the act. With the exception of this failure of intellect, she was much the same person that I have described her to have been before the attack.

But what strikes me most is, that, if Mr. Bonner had not considered her of sound mind, he would not have put her in possession of her title-deeds and of her property. The conduct of Mr. Bonner at that time is what the Court looks to, not his opinion now, and his conduct shews that he considered her as not an unfit person to be intrusted with the control over her property. I am, therefore, of opinion that the deceased, on her return to Cheltenham, in February, 1830, had, in the opinion of Mr. Bonner, returned to her usual state and condition, and Williams proves that, after her return, the deceased was pretty much in the same state as before. And from February, 1830, she continued to manage her affairs, conferring with Mr. Bonner, receiving her rents, investing her dividends, directing letters to be written to her tenants, and transacting matters of business, up to November, 1839, Mr. Burrup, one of her solicitors, remarking that, in 1837, she appeared a little flighty.

Now, at the end of November or the beginning of December, she became again insane, and continued in a state

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of fatuity till her death. But the interval between this period and her return to Cheltenham, in 1830, is most important, for during that interval this will was executed, in December, 1830; it is in her own handwriting, and came (as the Court has no doubt whatever) from the custody of the deceased on the 17th December, 1839, when it was delivered by her to Mr. John Brand Winterbotham; and whatever may be the effect of the paper, it is clearly the emanation of her own mind, thought, and suggestion, for no one seems to have been previously aware of its existence. This will is somewhat of an extraordinary character; but the deceased herself was of an extraordinary character; her whole conduct was marked with eccentricity, and led many to conclude that she must have been insane.

Before I consider the contents of the will, I may refer to certain exhibits annexed to the Allegation and the Interrogatories. [The Court here read and commented upon a variety of documents,—receipts for rent, and letters from the deceased to her tenants and bankers, the latter dated in 1830,—running down to 26th November of that year.] It is quite impossible to say (these letters coming down to the latest period of time) that the deceased was at this time incompetent to manage herself and her affairs, notwithstanding she may have been absurd and eccentric, more so, perhaps, at one time than at others. I am clear that she was able to manage her affairs, and to manage them to the best advantage. Under these circumstances, the Court comes to consider the contents of this will.

Marks of eccentricity in the will.

The will does bear marks of eccentricity; but I am not, therefore, to say that the deceased must be considered to have been insane. It has been said that from a rational act rationally done you may infer a lucid interval; that this doctrine was held in *Cartwright v. Cartwright*; but in *Chambers v. Yatman*,* the Court held that that doctrine was not applicable to all cases, since, if pushed to the full extent, it would go too far. Here is not one tittle of evidence to shew that there was any communication between

* 2 Curt. 415.

the deceased and Mrs. Mudway, her only near relation ; there is no evidence of any regard or affection between them, and there is nothing which renders it likely that the deceased would make her an object of her testamentary bounty.

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Now, what are the contents of the paper? To be sure, Its contents. £100 to preach a sermon at her interment may seem a large sum ; but the deceased was patroness of the Living, and the will imposes duties on the vicar, and it may be that her object was to give this £100 as some compensation for that trouble. I do not find, therefore, any thing insane in this ; and though the words from which the sermon was to be preached, or similar ones, are not to be found in the Bible, is the will on that ground to be a nullity? I cannot say that, because the words are not to be found in the Bible, therefore, the idea is an insane one. The deceased had been unfortunate in being brought up in seclusion, and when she considered the vanity of all things in this life, she thought of these words, " I leave all without a tear ; nothing in this life worth regarding did I ever see." There is nothing absurd in her devoting £500 to a monument in the chancel ; there may be vanity in it, but I cannot say it is insane and sounds to folly. The bequest of £1,000 for communion plate, for the church of a small village, is extraordinary ; but can I say it is insane? It may be given with a very wrong notion of what plate would cost ; and the £50 for a damask cloth may be extravagant ; but I cannot say it is so absurd as to amount to a demonstration of unsoundness of mind. None of the other bequests can be considered as indications that the will is the offspring of a diseased imagination.

But it does not end here : the deceased lived for ten years after the execution of the will ; for a long time after its execution she continued in the possession of her property and the management of her affairs, and was treated by every person as competent thereto. In 1831, she employed Messrs. Winterbotham, as her solicitors, in a variety of business transactions ; she opened an account with a bank, and gave instructions for the preparation of a will,

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history of de-
ceased.

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and nothing can be more clear than her intention to bequeath her property to Richard Wicks. She had bequeathed the whole of her personal property to whatever person should prove at her death to be her surviving heir at law; but, in 1837, she declared that her cousin William Wicks (who was her heir at law) was "a great rascal;" she, however, changed her mind, and gave the personal property, in addition to the real estate, to Richard Wicks.

Evidence.

Mr. J. B. Winterbotham states that he became acquainted with the deceased in 1831, and that from that time to 1835, or the beginning of 1836, she continued to employ him and his brother. He says, judging by the appearance of her house and furniture, he considered the deceased a person of penurious habits:

She was a person of some singularity of manner; she had a short way of speaking. I always thought her a person of considerable acuteness, especially so far as concerned her own interest. I should not say she was a person of general intelligence; I should not judge she was a person of much education; but as regards her interest or any matter of business, I always found her as acute as any woman could be. She was most unquestionably aware of what were her rights, as regarded her property of every description, and she was as sharp and determined in protecting her rights as any one I ever knew. So far as came within my knowledge, she at all times managed her own affairs and concerns; she did so in every matter that I had to do with her, and invariably she did it rationally and sensibly. Whenever any tenant came to pay her rent, she used to send for me to come and write the receipt for her. She used to receive the money herself, and herself sign the receipt. She used to direct me to look into the tenants' accounts of deductions for repairs and other things; she always entered into these matters herself, making inquiry as to the nature of each deduction, and allowing or disallowing it as she was satisfied of its being a correct claim upon her, or the contrary. In the various matters beside in which we were concerned for her, she gave us all necessary directions and instructions, and upon them we acted.

And every one acted in the same way. The same account is given by the other Mr. Winterbotham. He then speaks of the preparation and execution of the will of 1833. He

says the deceased came to their office and saw him in the first instance, and requested him to make a will for her, confined to her real estate, devising it to her cousin, Richard Wicks, for life, and afterwards to his son absolutely ; she said she did not know where he resided, but described him as the youngest son of John Wicks, of Frampton-on-Severn, gentleman ; that she said she wanted the will confined solely to her real estate, and that she would leave (or had made) her own memoranda as to her personal property ; that, after the deceased left him, he communicated what had passed to his brother, Mr. Rayner Winterbotham, who is his senior, who suggested that it had better be one entire will, disposing of the personal as well as the real property, and it was arranged that the matter should stand over till the deceased came again, according to appointment, and that he (Mr. R. Winterbotham) would see her himself ; that, on the 8th August, 1833, he attested the execution of the will, with his brother and Mr. Wall ; that the deceased then took possession of the will, and he saw no more of it till the 17th December, 1839, when she delivered it to him with the other papers.

Mr. Rayner Winterbotham has likewise been examined, and his evidence is to the same effect as that of his brother. He says he prepared the will from instructions which he received personally from the deceased's own mouth ; that she mentioned to him on the occasion that William Wicks was her heir at law, and he believes that she assigned some reason why she did not leave him any part of her real estate, and why she had the will confined to her real estate ; that he is confident he should not have prepared the will, confined to real estate, and appointing no executor, if she had not assigned some reason for its being done in that form ; that his impression is, that he prepared the will in her presence, and she executed it in his presence and that of his brother and Mr. Wall. This witness, as well as his brother, entertained no doubt, at the time, that the deceased was of perfectly sound mind, memory, and understanding.

Now, this will purports to devise all her real estate to Will of 1833. her cousin, Richard Wicks, youngest son of the late John

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Wicks, of Frampton-upon-Severn, gentleman, for the term of his natural life, and after his death, to his eldest son, his heirs and assigns, for ever ; it is dated the 8th August, 1833; it is signed by the deceased and attested by the two Messrs. Winterbotham and Mr. Wall: therefore, this will is in favour of the very individual to whom by the will of 1830 she had given the whole of her personal property ; and as in the will of 1830 she had directed that all that property should go to the person who would have taken her real estate, if this will had not been made, so she alters that will, by giving her personal property to the same individual to whom she gave the real estate.

Disposition
 adhered to by
 deceased.

Now, did the deceased adhere to the disposition contained in these two papers ? In 1837, she spoke to Mr. Burrow about making or altering her will, but as he thought her a little flighty just then, he put her off ; but, with this exception, there is no appearance of any intention of deviation from this disposition, and she retains the custody of the two papers till the 17th December, 1839, when she delivered them to Mr. J. Winterbotham, and desired him to have copies made of them, and he did so. The Court is satisfied that the papers were delivered by the deceased to Mr. Winterbotham, and that the paper of 1830 is in the same plight and condition in which it was when delivered to him ; and having been in her possession and adhered to for so many years, without variation or deviation, this is something to shew that the deceased was capable of understanding what was done, and though Mr. J. Winterbotham says he will not depose that, in 1839, she was of sound mind, or that he would have taken instructions from the deceased, that must not reflect back too far, to shew that she was insane in 1830 because she was so in 1839. It is her conduct, sane or insane, which the Court must look at, to see that the paper was not improperly taken possession of, and that it was in the condition it is now in, rendered so by the act of the deceased herself, who said that the part torn or cut off was so removed because the legatee, whose legacy was written there, had died.

The will bequeaths £500 to the person that should keep

the will, and Mr. J. Winterbotham may be entitled to this legacy as the depositary of the will. If he has a claim under this bequest, he has released his interest for £300, payable by instalments, which renders him competent to be examined as a witness. I see nothing in this to reflect upon this gentleman, though it might, perhaps, have been more satisfactory if the legacy had been released for a nominal consideration; but I am of opinion that there is nothing in the conduct of the Messrs. Winterbotham that calls upon the Court to express any doubt as to their evidence.

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I am of opinion, therefore, that this is the will of a capable testatrix, though a very eccentric one, and her will partakes of that character; but there is no reference in it to the predominant subject of delusion or of diseased imagination; and though it is said, and truly, that it is not absolutely necessary that the will should be the actual offspring of delusion, if the deceased was insane, still it is a circumstance which tends to support the paper, that there is no reference in it to what is admitted to have been the predominant subject of delusion when she was of unsound mind. I am of opinion that the paper of 10th December, 1830, is entitled to the probate of the Court, and I decree administration with will annexed to Sir A. D. Croft, the Committee of the universal devisee and residuary legatee, who is a lunatic. Under the circumstances, I am clearly of opinion that the costs must be paid out of the property, as the case is one which required to be sifted.

The will of a
capable testa-
trix.

Administra-
tion with will
decreed.

Costs.

Proctors:—*Poynter*, for the next of kin; *W. Townsend*, for the residuary legatee.

OCTOBER 3.

IN THE GOODS OF SARAH GARDINER, WIDOW, DEC.—*A will, written on the first and third sides of a sheet of paper, the signatures of deceased and witnesses being on the second side, referred to in a Motion, ex parte.*—The deceased died 10th September, 1843, having executed her will, with a codicil, the former bearing date 22nd July, 1843, the latter 10th August, 1843, appointing her sons, T. G. and W. G., executors. The will is written upon the first and third sides of a sheet of letter-paper, the whole of the disposition, and the date, with the

OCT. 3. attestation-clause (continuously written, that is, without a break, after the date) ending at the bottom of the *third* side, so as not to leave sufficient room there conveniently for the signatures of the deceased and of the two witnesses, which, with their respective seals, were affixed at the lower part of the *second* side of the paper, which, otherwise, would have been blank. The codicil, which refers to the will by date, and expressly declares it to be a codicil to such will, is likewise written on the first and third sides of a sheet of letter-paper, but the signatures are at the end of the codicil, on the third side. The property was between £800 and £900.

MOTION. *Waddilove, D.*, moved for probate in common form to the executors.—The codicil expressly refers to and ratifies the will; but, independently of this, the execution may be taken to be in the spirit of the Statute, and the witnesses depose that the names were signed on the second side of the paper, “in consequence of the will and the clause of attestation finishing at the very bottom of the third side, and sufficient room not being left for the deceased’s signature at the immediate foot, and that the deceased, in so signing her name, meant and considered it to be at the end of the contents.”

DECREE. THE SURROGATE (DR. DAUBENY).—There is no difficulty in the case. The only question is, whether the will is signed at the foot or end. There was no room on the third side, and she signed on the second side, at the bottom, contiguous to the attestation-clause, and it must be considered that she signed at the bottom of the will.

Probate granted.

Stokes, Proctor.

END OF TRINITY TERM, AND OF THE SITTINGS
AFTER TERM.

MICHAELMAS TERM, 1843.

Prerogative Court of Canterbury.

NOVEMBER 7.

IN THE GOODS OF JOHN WHITE, DEC.—*Motion, ex-parte.* Attestation. The deceased in this case died on the 29th August, 1843. Two witnesses, a man and his will, which bore date 29th March, 1843, and appointed wife, called to wife executrix and residuary legatee, purported to be attest a will; the man sub-ularly signed and attested by two witnesses, but it ap-scribes both his red that one of the witnesses, J. C., signed not only his own name and 1 name, but that of the other witness, F. C., his wife, his wife's: — 0 was present at the same time. The question was, whe- Held, that this r this was a compliance with the Statute. is not a com-pliance with the Act. Haggard, D., moved for probate.

M^R H. JENNER FUST.—It is quite impossible that the Court DECREE. grant probate of this paper. The will is regularly writ- , and there are two witnesses' names subscribed, as attest- ; the will ; but it turns out that J. C. signed his own name attesting the execution of the will, and his wife's name . Both parties were present at the same time, and if the fe had subscribed her own name, there would have been due execution. The question is, whether, by the Statute, C. had authority to subscribe his wife's name. The words the Act are, "such signature shall be made or acknow- ged by the testator in the presence of two or more wit- nesses present at the same time"—if the Act had stopped re, this would have been a due execution ; but it goes : "and such witnesses"—in the plural number—"shall scribe the will in the presence of the testator." Now, it ears that J. C. did subscribe the will, but his wife did VOL. II. 3 P

A witness having attested a will appointing him universal legatee in trust for the benefit of the widow:—Held that his being an attesting witness did not render such bequest null and void, under sec. 15 of the Stat., which contemplates a beneficial interest to the party.

IN THE GOODS OF JAMES RYDER, DEC.—*Motion*
—The deceased died 27th April, 1843, having executed the day before, which had no attestation-cl the subscribed witnesses deposed that the exec conformable to the Statute. The will named no but appointed the deceased's brother, F. R., uni gatee in trust of the whole property for the wido was, however, one of the attesting witnesses, and tion was, whether, under the Statute, F. R. was no disqualified to act as legatee in trust.
Waddilove, D., moved for administration, with nexed, to F. R., as universal legatee in trust for t of the widow.

DECREE.

SIR H. JENNER FUST.—The question is, whet being an attesting witness to this will, the beque is not null and void; if so, he would not be as universal legatee in trust, to take the admi with the will annexed. The 15th section of th enacts:

That if any person shall attest the execution of a will in which he is named as executor or as legatee, or to whose wife or husband any beneficial devise, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby given or n

According to my understanding of this clause, the interest must be a beneficial interest to the party, to render the bequest void. Now F. R. is only universal legatee in trust or the benefit of the widow. I am of opinion, therefore, that F. R., having no beneficial interest under the will, is not entitled to administration with the will annexed, notwithstanding he is an attesting witness.

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Ryder, dec.

Motion
 granted.

Austen, Proctor.

JICKLING v. BIRCHAM AND READ.—*Act on Petition.*—The deceased (a person named Moore) died in September, 1818, having made a will, appointing two executors, who, on January, 1819, duly proved the will in this Court. In January, 1843, a Citation issued, calling upon the executors to exhibit an Inventory and Account, at the suit of Nicholas Jickling, a creditor. It appeared that, in 1807, Jickling advanced to Lord F. a sum, for which an annuity of £66. 13s. 4d. was by deed stipulated to be paid, and the deceased, as solicitor, through whom the negotiation passed, was appointed a trustee to receive and pay over the annuity. In 1809, Jickling not being satisfied with the security, Moore (the deceased) gave him a guarantee, covenanting to pay the annuity in case of default by the borrower. He (the deceased) died in 1818, up to which date the payments had been regularly made. In 1838, Lord F., the grantor of the annuity, died, at which time eighty quarterly payments were due, none having been made from 1818 to 1838. In 1842, an action upon the guarantee of 1809 was brought against the executors of Moore in the Court of Queen's Bench, to recover £1,333. 6s. 8d., the amount of the annuity unpaid, which action was still depending, though stopped by an injunction or interlocutory order from the Court of Chancery. An application was now made on behalf of Mr. Jickling, in the character of creditor, for an Inventory and Account of the estate of Moore, the deceased, from his executors, to ascertain the assets.

Inventory and Account,—ordered, at the suit of a creditor, whose debt was the subject of an action at law, 24 years after the death of the testator.

Jenner, D., for the executors. Considering that the testator died so far back as 1818; that the executors passed their

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accounts at the Stamp Office in 1824, prior to which no legal demand had been made on them ; that Jickling was in constant communication with the executors, and when complaints were made by him of the non-payment of the annuity, they always told him that, if it was intended to make the estate of Moore responsible, the demand would be opposed ;—considering all these circumstances, there is sufficient reason for the Court's exercising its discretion and refusing the application for an Inventory and Account. It is sworn that no assets remain to administer ; the debt itself is not admitted ; we deny Jickling to be a creditor ; we admit the execution of the deed, but not its validity, to determine which is the object of the action in the Court of Queen's Bench, and it may turn out that Jickling is no creditor at all.

Harding, D., contrà, stopped by the Court.

JUDGMENT.

SIR H. JENNER FUST.—The executors contend that the estate of Moore, the testator, is not liable ; that this never was a debt ; or, if it was, it is barred by lapse of time, so that Jickling is not entitled to come before this Court as a creditor. Now it is the duty of all executors to exhibit an Inventory and Account when called upon to do so, and although the Court has exercised its discretion, where a great lapse of time has occurred, to decline calling for an Inventory and Account, yet I do not know that the Court can take upon itself to say that there is no demand upon the estate where there is an action depending in a Court of Law. The object of the Account is to shew whether there are any assets in the hands of the executors, not to determine what is the nature of the debt, whether a specialty debt or a debt of any other kind ; that is to be determined by a Court of Law. The duty of this Court is to require an Inventory and Account, in order to shew what funds there are, and is the Court to hold its hand, and not give the party an opportunity of ascertaining the state of the funds, and whether there is any thing in the hands of the executors or not ? It is sworn that they have no assets—*plene administraverunt* ; but what is the proof ? That they have passed their accounts

Stamp Office, and that, as executors, they have no unadministered. But, as executors, they may have ver to themselves the surplus of the deceased's estate, residuary legatees they would not be entitled to take rplus till all demands were paid, and although, as ors, they may not have any funds in their hands, as ary legatees they may. In fact, it is a question for a of Law to determine whether or not Mr. Jickling ever creditor ; what is the nature of the debt ; whether it red by the Statute ; or whether there is any other d for withholding, disputing, or rejecting the claim.

n of opinion that, the grantor having died in 1838, e action having been brought in 1842, there is not a nt interval of time to bar the action. Moore, the tea- having died in 1818, up to which time the accounts alanced, such a great lapse of time might, under ordi- circumstances, have induced the Court to be satisfied he passing of the accounts ; but in this case it appears : least there was some communication between Mr. m and his solicitor and Mr. Jickling, as to his claim ; ore, he was aware that Moore's estate was considered and that a demand might be made upon him, and he at, when the demand was made, it would be resisted. arty wants a *constat* of the funds ; he wants to know e are any funds before he incurs further expense, and e duty of Messrs. Bircham and Read, as executors, to t an Inventory and Account, shewing that the assets een administered, or to admit assets sufficient to an- he demand of Mr. Jickling.

clearly of opinion that the petition of the executors e rejected : they must produce an Inventory and Ac- or admit assets.

tors:—*Shepherd*, for the creditor ; *Jenner*, for the exe-

Nov. 7.

Jickling v.
Bircham.

Not a lapse
of time to bar.

The duty of
the executors
to exhibit on
I. and A., or to
admit assets.

Their peti-
tion rejected.

NOVEMBER 16.

THE GOODS OF ANNE ASHMORE, WIDOW, DEC.— Attestation.
i, *ex-parte*.—The deceased died 19th August, 1843, —An aged tes-
tatrix, in writ-

Nov. 16. aged 86, having, in 1841, executed a will, which was duly attested, whereof she appointed two executors. On the 16th June, 1843, she went into a small bed-room, adjoining her own, in which two of her servants, Ann Cole and Elizabeth Sharpe, were employed, with a paper in her hand, to which she desired them (as she knew they could not write) to put their marks, which they did, without any observation being made as to the nature or contents of the paper; but one of them (Cole) saw the signature of the deceased upon it. After her death, a codicil, which was all in her own handwriting, was found, with the marks (recognized by the witnesses) of Ann Cole and Elizabeth Sharpe affixed to a clause of attestation, written by the deceased, and a designation of the persons whose marks it purported to bear, as "Elizabeth Cummings," who was not present at the time (and not at the date of the codicil, though she had been, in the service of the deceased), and "Elizabeth Sharpe."

MOTION.

R. Phillimore, D., moved for probate of this paper as sufficiently attested. The marks are equivalent to the signature of two witnesses, who were present at the same time, though the testatrix, inadvertently, owing to her great age, wrote a wrong name for one of them.

DECREE.

SIR H. JENNER FUST.—The circumstances of this case are peculiar. The codicil in question disposes of a few small articles and gives legacies of £5 each to the deceased's servants. At the end are the marks of two attesting witnesses, described, in the deceased's handwriting, one as the mark of "Elizabeth Cummings," the other as the mark of "Elizabeth Sharpe." Now it appears that Elizabeth Cummings was not in the house at the time, and that it is not her mark which the paper bears, and it is clear that the deceased, through inadvertence, wrote one name for the other. But I do not think that this is important, as the two witnesses swear that they were present at the same time, and made their marks in the presence of the deceased and of each other. I think this is a sufficient attestation, though the deceased wrote the name of Cummings instead of Cole. The question is, whether there was an acknowledgment

The witnesses swear that the paper, which is all in the deceased's handwriting, was produced to them, and one of them says she saw the deceased's name, which is at the end. The Court has already held that, where a paper is in the handwriting of the deceased, who produced it to the witnesses at the time of attestation, with his or her signature thereto, and the witnesses attest it at the deceased's request, amounts to a virtual acknowledgment. If the property in this case had been large, the Court might have required the paper to be propounded, in order that the question might be argued; for it has never yet been argued. In *Holt v. Genge*,* the signature was concealed. I think, in this case, where the property is so trifling, the Court may hold that this was a virtual acknowledgment of the signature.

Nov. 16.

Ashmores, dec.

A virtual acknowledgment.

Thomas, Proctor.

IN THE GOODS OF JOHN PEPPER, DEC. — *Motion, ex-parte.* The testator died 25th September, 1843, leaving a will and two codicils. By the will, dated in March, 1843, he appointed R. D. and T. B. C., executors and residuary legatees in trust. In the first codicil, dated in August, 1843, is the following passage:

I hereby appoint my two friends, the Rev. R. D. and Mr. J. R., trustees instead of my nephew T. B. C., I put out as one trustee who is appointed in my will, and that the said J. R., my brother-in-law, have full power to act with the Rev. A. D. in all things in my will, as well as this my codicil to it, and be paid the same sum of nineteen guineas, as small tokens of respect, instead of my nephew T. B. C., and the said two trustees shall be paid all reasonable charges and expenses they are at for their trouble and travelling expenses, and shall not be answerable for any loss or defect which may happen on their parts, &c.

The testator had not, however, in terms, appointed J. R. executor as well as trustee. T. B. C. had renounced the executorship.

Addams, D., moved for probate to J. R., in conjunction with R. D., as joint executors and trustees. It was

A testator, in making a substitution of an executor and a residuary legatee in trust, omits to name in terms the substituted party executor: — Held, that as, by the terms of substitution, it was the testator's intention to place the party substituted in the same position as the party removed, the former was entitled to take probate as executor.

MOTION.

* 1 Notes of Ca. 572.

Nov. 16. clearly the intention of the testator to substitute J. R. instead of T. B. C. as executor as well as trustee, and by *Pepper, dec.* the words "that the said J. R. have full power to act with R. D. in all things in my will," J. R. was in effect constituted a co-executor with R. D., in substitution of T. B. C.

DECEASED.

SIR H. JENNER FUST.—I am inclined to think that this is a substitution of J. R. as executor. In the will the testator appoints "the Rev. R. D. and Mr. T. B. C., executors of this my will, and I give to each of my said executors the legacy of nineteen guineas each." So that the legacy of nineteen guineas was given to them in their capacity of executors, *eo nomine*. In the codicil, he appoints J. R. instead of T. B. C., with "full power to act with the Rev. R. D. in all things in my will, as well as this my codicil to it," and he gives J. R. the legacy of nineteen guineas on the same ground as he had given the same legacy to T. B. C.; so that, beyond all doubt, it was the meaning of the testator to substitute J. R. for T. B. C., as executor as well as trustee, though he has not used the word "executor." I think this is sufficient to constitute him executor according to the tenor, if not in terms. Under these circumstances (particularly as T. B. C. has renounced probate), I am of opinion that I can decree probate of the will and codicils to R. D. and J. R. as executors. [*The Registrar*. To J. R. as executor named in the codicil, or according to the tenor?] No, as executor.

Motion granted.

Form of probate.

Nicholson, Proctor.

Administration. — Questions arising on the presumed death of a party not heard of for 26 years.

IN THE GOODS OF CHARLES FARRINGTON, DEC.—*Motion ex-parte.* The deceased was for many years a seaman in the royal navy, and when absent at sea constantly corresponded with his father and mother. In December, 1815, he was paid off from H.M.'s ship *Queen*, and in 1816 he entered the merchant service, to trade to the Black Sea. In November, 1817, a letter was received from him, dated "American brig *Herald*, Isle of France, May 29, 1817," addressed to his father and mother, in which he expressed his determination to return home if he could get a ship bound for

England. When he left England, in 1816, he knew he was entitled to certain prize-money, and that, if he survived his father, he would become entitled, on his father's death, to a share of £500, under the will of his grandmother. The father died in May, 1820, having made his will appointing executors, who proved the same in that year, and a few days after, the share of the deceased (C. F.) in the £500 was invested in his name in the purchase of £126. 6s. 3d. Three per Cent. Consols; and upon the death of one of his brothers intestate, in April, 1825, a further sum of £25. 5s. 3d. stock was added thereto. No information had been obtained respecting the deceased since the date of his letter of 29th May, 1817, or concerning the American brig *Herald*, and the prize-money due to the deceased in 1816 had become forfeited, not having been claimed within six years. If the deceased died before his father, no part of the £500 bequeathed by his grandmother, would have vested in him, but his surviving brother and sister would become entitled thereto. The father, by his will, bequeathed the residue of his property to his wife for life, and upon her death equally amongst his children. She died in 1836 intestate, so that the beneficial interest in the deceased's property vested in his brothers and sisters, either of whom would be entitled to the administration of his effects (as no will was forthcoming) if he survived his father. There were, therefore, two questions: first, whether the alleged deceased was to be presumed dead; secondly, if dead, whether he died before or after the death of his father in 1820.

Jenner, D., moved for administration of the effects of the deceased to the executors of the father. As the deceased had not been heard of for more than seven years, the presumption of law is, that he was dead; and it is reasonable to presume that his death shortly after the date when he was last heard of (1817) was the cause of his not being again heard of. *Doe v. Nepean*.^{*} *Webster v. Birchman*.[†] The brothers and sisters of the deceased will consent to the motion.

^{*} 2 Mees. & W. 894.

[†] 13 Ves. 362.

Nov. 16. **SIR H. JENNER FUST** considered that there was a difficulty in presuming that the deceased had died prior to 1820, when the father died, and it was on that assumption alone that the executors could take administration; but as there had been advertisements for the next of kin, without any application, and as the brothers and sisters were prepared to consent, on such consent being brought in, the Court would decree administration to the executors of the father.

Farrington, dec.

DECREE.

Motion granted.

For, Proctor.

Consistory Court of London.

NOVEMBER 18.

Suit for divorce by reason of cruelty, by wife against husband; facts pleaded held not to amount to legal cruelty *per se*, or to revive past alleged cruelty condoned. — What is required to revive condoned cruelty.—*Libel* rejected.

EVANS v. EVANS.—Libel. This was a suit for divorce by reason of cruelty by Elizabeth Price Evans against Thomas Evans her husband. The Libel, which now stood for admission, pleaded as follows :

1, 2, 3. That the parties were married in 1835, cohabited together, as husband and wife, till 13th July, 1843, and had two children, the husband being a wholesale umbrella-maker in Silver street, London. 4. That, in September, 1838, the wife was attacked by paralysis, and in the November following, she being much enfeebled thereby, and also far advanced in pregnancy, the husband compelled her to leave his house, and go into lodgings at Limehouse, in opposition to the express advice and remonstrance of the wife's medical attendant, and without alleging a pretext. 5. That, in February, 1839, the wife, at her earnest request and solicitation, was permitted by the husband to return to his residence, where she was shortly delivered of a still-born child; that, notwithstanding her painful and dangerous situation, the husband refused to allow her the usual care and attendance of a nurse during any part of her confinement, and she was reduced to the occasional services of the only servant, who (acting at the instigation of the husband) treated her with great neglect, carelessness, and impertinence, and so as to materially affect her health and retard her recovery. 6. That, throughout the period mentioned in the preceding articles (whilst the parties cohabited together).

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life was not allowed by the husband the usual number of meals, proper and sufficient quantity of food and nourishment thereat, such food was frequently of an inferior and unwholesome detri-
tion, so that, in consequence thereof, and of the other circum-
stances, the general health and bodily constitution of the wife
gradually declined, until, in June, 1839, for her own protection
the improvement of her health, she was compelled to leave
husband. 7. That in August, 1839, the husband being one of
guardians of the poor for the united parish of St. Alban,
Old-street, and St. Olave, Silver-street, by stratagem, procured
wife to be taken to, and confined in, a workhouse, belonging
the united parish, at Peckham, where she remained in con-
tempt and *duress* as a pauper (under the directions and
through the contrivance of the husband) until January, 1842, when,
with the assistance of her brother, she at length made her escape
from the workhouse. 8. That, after her escape, the wife resided
in various places without receiving any support or assistance from
husband, but entirely subsisting on the bounty of her relatives
and friends, until March, 1843, when, by their advice, she instituted
proceedings for restitution of conjugal rights. 9. That a citation
was accordingly issued against the husband, who, in obedience thereto,
on the 3rd May, 1843, consented to take home his wife. 10.
That the wife accordingly, on the 4th May, 1843, returned to her
husband's house, and continued to live there till the 13th July,
when she was again compelled finally to leave the same.
That, after she had been received back, as aforesaid, she was
permitted by her husband to sleep in one of the garrets, three
stories high, notwithstanding her being lame from paralysis,
that she continued to sleep separate and apart from her in the
best and best-furnished bed-room; that she was not permitted
to enter any of the rooms, except the garret, and the par-
lour wherein she took her meals with him, the other rooms being
locked up from her; that the meals were supplied under the
directions of the husband, and were of a very inferior quality and
description, and by his express order generally consisted of boiled
meat notwithstanding the same had been on former occasions
expressly forbidden to her by her then medical attendants, on
ground of the same being injurious to her health, and such their
prohibition was well known to the husband; that, immediately
after the said meals, the husband uniformly left the house, for the
purpose of having other and better meals elsewhere, and did not
return home till a late hour in the morning, and generally in a state
of intoxication; that he constantly addressed his wife by the ap-

Nov. 18. *Evans v. Evans.* pellation of "whore," and by other cruel and insulting epithets, and also instigated and encouraged his brother, who lived in the same house, to abuse and insult and otherwise annoy her. 12 That, from the beginning of June to the 13th July, 1843, the husband continued the same harsh and cruel behaviour towards his wife; that he would not permit her to go out, and, to prevent her, he took possession of the key of the street-door, which he kept locked, and also removed the walking-stick or crutch belonging to his wife, which she was compelled to use, owing to physical weakness, and caused the sashes of the windows of the parlour to be fastened up, and the windows to be painted white outside; that prior to and during the aforesaid period, fresh air and exercise had been particularly recommended to her and were absolutely necessary for her health, which considerably declined in consequence of such confinement and *duress*, until the 13th July, 1843, when, having found the street-door unlocked, she left the house.

Haggard, D., against the admission of the Libel; *Curtis, D.*, in support of it.

JUDGMENT.

DR. LUSHINGTON.—The Citation in this case was, at the suit of the wife, in a cause of divorce by reason of cruelty and adultery on the part of her husband. The Libel now offered contains no charge of adultery, but it is contended, on behalf of Mrs. Evans, that, on all the facts taken together, the Libel is admissible; and that, if proved, they are sufficient to found and support a claim for separation.

Facts pleaded to shew cruelty before condonation.

The Libel, after pleading the marriage, sets forth certain circumstances which occurred between the parties from the commencement of their cohabitation in 1835. The 4th article pleads that the wife was, in that year, compelled to leave her husband's house; the 5th pleads her return, her confinement, and the denial of the assistance of a monthly nurse; and the 6th pleads that her husband refused to allow her the usual number of meals; that her provisions were unwholesome, and that she left him, and went to reside elsewhere. The 7th article pleads circumstances of a very peculiar nature, for it alleges that, at the instance of her husband, from August, 1839, till January, 1842, Mrs. Evans was confined in the workhouse belonging to the united parish of St. Alban, Wood Street, and St. Olave,

ver Street, at Peckham. Now this is a circumstance Nov. 18.
 which produced some surprise in the Court, and, for the
 purpose of the present consideration, I will presume that *Evans v. Evans.*
 circumstances pleaded are sufficient to have founded a Presuming
 suit for cruelty, and to have obtained a separation. But it them to be suf-
 ficient;
 important that I should now look at what was done by
 a. Evans, both in this Court and on her return to cohabi-
 tion.

In March, 1843, a suit was brought by Mrs. Evans suit for resti-
 tution of conjugal rights. No tution, and re-
 decree (as I am informed) issued from this Court; but Mr. turn to coha-
 bitation,
 Evans, in consequence of the Citation, consented to receive
 back his wife, and she returned on the 4th May. Now, what
 is the effect of this suit for restitution, and of her return
 to cohabitation? I apprehend, a complete and perfect con- a complete con-
 donation of all that had taken place before. Whatever donation;
 might be the nature of the cruelty—whether it consisted of
 personal violence, or threats of personal violence, or such
 treatment as shewed it was impossible for her to cohabit
 with her husband with safety;—it cannot be denied, for it is
 beyond all doubt, that her commencement of a suit
 for restitution of conjugal rights, and her returning again to
 cohabitation, amounted to a complete condonation. Indeed,
 may be pressed further in argument: if the husband was
 guilty of cruelty, and did so conduct himself to his wife that
 he incurred danger to life and limb, it is a most extraordi-
 nary mode of seeking protection, to resort to this Court for a
 restitution of conjugal rights, and to return to cohabitation
 with the very person from whose conduct such danger was
 apprehended: and therefore the proceeding of the wife does and affords rea-
 son to believe
 good strong reason to believe that she never could have no apprehen-
 sion.
 considered her life in danger, if she voluntarily returned to
 state in which she would be exposed to a repetition of

such treatment without protection. I am bound to consider
 the case on this principle.

Now, the first issue in the cause is, has any thing occurred
 since the parties returned to cohabitation together which
 would revive the cruelty alleged to have taken place before?
 The subject has been over and over again discussed in these

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To revive con-
 doned cruelty,
 there must be
 something of
 same kind.

Facts plead-
 ed subsequent
 to return.

Courts, and although it may be very difficult to lay down any precise rules of universal application, yet the general principle, recognized by various decisions (though there may be some exceptions) is that, in order to revive cruelty that has been condoned, there must be something of the same kind—it is not necessary that it should be so strong as the original cruelty—but something to shew that the husband continues of the same disposition and in the same state of mind, and that there is a well-grounded fear that he would be guilty of the same acts of cruelty originally complained of.

I now proceed to the second part of the Libel. The wife returned in May, 1843, and the 11th and 12th articles contain charges of alleged cruelty pleaded to have occurred since her return. The first averment in the 11th article is, that the husband compelled his wife to sleep in one of the garrets of the house, notwithstanding her lameness, occasioned by paralysis, whilst he slept apart from her in another and a separate room. Now it is abundantly clear that this charge, standing alone, is no act of legal cruelty, since the Court cannot undertake to compel parties to sleep in one and the same bed. Then it is alleged that she was not permitted to enter any other room of the house except the parlour, to take her meals. Now, whether this be an act of harshness or not, it is a circumstance which cannot come within any definition of cruelty ever laid down in these Courts. Then it is pleaded that meat of inferior quality was provided for her, and, by the express order of the husband, generally boiled beef, notwithstanding the same had been on former occasions peremptorily forbidden by her medical attendants, on the ground of its being injurious to her health, which prohibition was well known to the said Thomas Evans. Now, I think so slight a circumstance as this scarcely ever found its way into a Libel charging cruelty against the husband, and it is quite impossible for the Court to enter into an investigation of such a circumstance, so as to be enabled to form a judgment with regard to it, and if sufficiently proved, it is equally clear that it would be impossible to hold it to be an act of cruelty. Then the Libel

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to allege that the husband left the house, and did not come home till late, generally intoxicated, when he addressed his wife by gross and insulting epithets. Now, intoxication, unless it lead to personal violence, is not sufficient to support a charge of cruelty; personal abuse is very reprehensible, but it is not capable of being the subject for the Court's investigation. I have not been saying that the 11th article does not contain sufficient matter for the revival of any cruelty which may have been committed at a time anterior to the suit for the restitution of conjugal rights. The circumstances pleaded in the defence are rather extraordinary circumstances, extending from the beginning of June to the 13th July. It pleads, in legal terms (what is absolutely useless for the purpose of the case), that the husband continued "the same harsh and cruel behaviour," and that he encouraged his brother to do the same conduct towards her." What is this harsh and cruel behaviour? No evidence could be taken on such a plea. It is requisite that there should be some circumstances pleaded. No examiner could take down evidence on a plea so worded: "That the said Thomas Evans would not permit his wife to go out, and in order more effectually to prevent her from doing so, at the same, he took possession of the key of the door, which he kept locked accordingly, and also removed the walking-stick or crutch belonging to his wife, and was compelled to use the same owing to physical weakness, in consequence of the paralytic seizure before mentioned, and caused the sashes of the windows of the house to be fastened up, and the windows painted white outside." Now, I believe the meaning is, that the windows were fastened so that she could not see out, but I do not see the relevance of the next part: "that prior to and during the period aforesaid, fresh air exercise had been particularly recommended to and was absolutely necessary for her health, and the same denominated the consequence of such her confinement and *duress*, on the 13th July last," when she left the house. Now, in an alleged confinement, happening in some parts of the month of July, during which time she was not permitted to

Nov. 18. leave the house. I am of opinion that this, standing alone, is not sufficient to revive former cruelty. I do not say that, if the former cruelty had been of a different description; if there had been gross personal violence, and blows had been struck, and life had been put in danger, or there had been threats of violence and other things of that kind which is characterized as severity and harshness; I do not say that I should not have thought these averments shewed the reviving of the cruelty in another shape. But what is the result? Certainly, even if what is stated in the Libel with regard to the charge of confinement in the workhouse was proved, it does not partake of the character of violence. There is no one act of personal violence—no one threat—nothing, in short, but what all wives must take their chance of when they take upon themselves the yoke of matrimony. I am clearly of opinion that it is my duty to stop this litigation, and I reject this Libel.

Not sufficient
to support the
suit.

Libel rejected.

Proctors:—*Wills*, for the wife; *Ring*, for the husband.

High Court of Admiralty.

NOVEMBER 24.

Collision.— THE “TRAVELLER.”—*Cause, by Plea and Proof.*—The schooner *Yarm*, of 43 tons and three men, heavily laden with grain (oats), from Bridlington to London, and the brig *Traveller*, of 113 tons, a collier, in ballast, proceeding from Lynn to Hartlepool, in the night of the 4th January, when off the Spurn Light, came in collision, in consequence of which the schooner was so severely damaged, that she soon afterwards sank. For this damage, the owners of the *Yarm* sued the *Traveller*. The Court was assisted by Trinity Masters.*

When two vessels are approaching each other, and there is the slightest danger of a collision, proper steps must be taken to avoid it, and at night, even if the vessel on the starboard tack has the wind free, it is the duty of a vessel on the larboard tack to give way.

Addams, D., and *Robinson*, D., for the *Yarm*; *Sir John Dodson*, Q. A., and *Harding*, D., for the *Traveller*.

* Captain Rees and Captain Gordon.

DR. LUSHINGTON (addressing the Trinity Masters).—
 Gentlemen, I apprehend that the true question in this case
 which of the two vessels, under the circumstances de-
 cided in the evidence, ought to have kept its wind, and

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Traveller.

JUDGMENT.

which ought to have given way. The facts of the case are
 mainly embarrassed by the great contradictions in the evi-
 dence on both sides ; and not only is the evidence itself con-
 flicting, but, with respect to some of the statements made
 on behalf of the vessel proceeding in this cause, there is a
 difference between the plea originally given in and the evi-
 dence given by the witnesses ; and there is also between the
 witnesses themselves some discrepancies in their statements.

I will first briefly state what is the case on the part of the
Yarm, and what is the evidence, so far as I think it is im-
 portant, to support that statement. This vessel was proceed-
 ing from Bridlington to London ; she was on the starboard
 her course being S., with the wind (according to her
 statement) W.S.W., and the place of collision was after she
 passed the Spurn Light, and which bore W. and by N.
 She continued her course, having hailed the *Traveller* to put
 her helm a-weather, which the *Traveller* did not do, but kept
 her course. This is the statement in the Libel ; but in the
 evidence given on behalf of the *Yarm*, the collision is attri-
 buted not merely to the *Traveller* having kept her course,
 but to her having put her helm to leeward. Now, according
 to my view of this case, supposing the matter rested here,
 it has been argued by the Counsel for the *Traveller*, I do
 say that the difference of statement between the Libel
 and the evidence is of great importance, because, if it were
 the duty of the *Traveller* to give way, whether she omitted
 to give way, or put her helm the wrong way, is of no im-
 portance—she would be equally to blame.

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Yarm.

The *Traveller* puts her case in this way :—that she was on
 her voyage from Lynn to Hartlepool ; that she was on the lar-
 ge tack ; that her course was N. and by W., the wind
 by N. to W.N.W., but that her course varied as the wind
 changed ; that the *Yarm* was hailed to go to the windward,
 therefore, in the judgment of those on board the *Tra-*

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veller, the duty of the *Yarm* was to give way, and her own duty was to keep her course, as she states she did.

Let us now consider what was the position of these vessels when they were first seen from each other. On the part of the *Traveller*, it is stated that the *Yarm* was descried about two points and a half on her lee bow; on the part of the *Yarm*, the statement is of a contrary nature. I do not think it is necessary to enter minutely into the question as to which of these statements is correct, for the following reasons:—In the first place, it would be scarcely possible to ascertain the facts from the evidence; and secondly, I take it that it has been clearly laid down by the gentlemen of the Trinity House, that when two vessels are approaching each other, it is not a question of material consideration whether one is a point to the right or to the left; but if there is the slightest danger of a collision, it is necessary that proper steps be taken to avoid it, and you must not, because you imagine that a vessel is two points on the lee bow, do nothing, but you must act under these circumstances, if there is a bare chance of a collision. It is admitted to have been a clear night—I mean, that the witnesses on behalf of the *Traveller* say that a vessel might have been seen at the distance of a mile, and, therefore, it could not have been a dark night, and there was time to adopt measures. It is not denied, on the part of the *Traveller*, that they descried the *Yarm* in ample time to put the helm to windward, if that was a proper step to be taken; but, on the contrary, they say, according to their judgment, she ought to have kept her course, and ought not to have gone away.

The difficulty of the case is this: supposing the wind were as stated by the *Traveller*, what were the duties of the two vessels? If the wind were as stated on behalf of the *Yarm*, there cannot be a doubt that the *Traveller* was to blame, according to the rules you have laid down, that a vessel close-hauled on the starboard tack is to keep her course, and a vessel on the larboard tack to give way. If you are of opinion that, the wind being to the N. of W., the *Traveller* ought to have given way under the circumstances, then she is clearly to blame on the present occasion, because

lame could be imputable to the *Yarm*, even if she did
ated by the *Traveller*, because it would have been her
to keep her course. Now, therefore, you will favour
with your opinion, whether you think the *Traveller* was
lame or not, for that is the real point.

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Traveller.

APTAIN REES.—The *Traveller* ought to have given way.

ER CURIAM.—Under these circumstances, I pronounce PER CURIAM.

he damage, with the costs: but this and other decisions
very important with respect to vessels engaged in the
ipation in which these vessels are, because it is clearly
opinion of the gentlemen by whom I have been assisted,
his case and in other cases, that even had the vessel on the
board tack had the wind from the N. of W. three points
still, under the circumstances, at night, it is the duty
vessel so sailing on the larboard tack to give way to a
el on the starboard tack, even though the vessel on the
board tack had the wind free.

roctors:—*Buckton*, for the *Yarm*; *Glenny*, for the *Traveller*.

Prerogative Court of Canterbury.

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THE GOODS OF JOHN LEWIS GORE, DEC.—*Motion*, A will writ-
arte.—The deceased died 2nd August, 1843.—He left a ten on the first
in his own handwriting, dated 14th April, 1838, which side of a sheet
written on the first side or page of a sheet of paper, second side be-
instead of signing his name at the conclusion, after the ing blank, and
the signatures
ds, "I have hereto set my hand and seal this 14th of the testator
of April, 1838," he wrote the attestation-clause, and and witnesses
ed his own name, and caused the witnesses to sign, on being on the
third page, the intervening page being blank. thirdside,—ad-
mitted to pro-
bate.
White, D., moving for probate, cited *Re William Carver*.^{*} MOTION.

* 1 Notes of Ca. 276. (Since rep. 3 Curt. 29.)

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Gore, dec.

DECEASED.

The whole
property given
to the wife.

The signature
is at the end.

Probate de-
creed.

SIR H. JENNER FURT.—There is this material distinction between the cases, that, in the case cited, the testator signed at the bottom of the next page to the will, the upper part being blank, and here is an entire blank page. There is a circumstance in this case, however, which induces me to consider this a sufficient execution:—the whole of the property is disposed of by the paper to the wife, who is the sole executrix, and, therefore, there is no reason to suppose that the deceased ever intended to make any other bequest. If there had been legacies to different persons, and the whole property had not been disposed of, and no executor had been appointed, the Court might have thought that the paper had been provisionally executed, and that the testator meant to have added to it from time to time; but here the whole property is disposed of, and the whole interest is given to the wife. The Court cannot entertain a doubt as to the intention of the testator, and the paper is written very fairly, without erasures of any kind, and there is no doubt that there has been a due execution of this will, provided the Act is sufficiently complied with, which requires that the will shall be signed “at the foot or end.” Now, if it is not signed at the foot, is it not signed at the end? The object of this clause in the Act was to prevent any question as to whether a signature at the commencement was not sufficient, which was deemed sufficient under the Statute of Frauds, and it is now required that the signature shall be at the foot or end. I think, under the circumstances, that the Court may consider that, if the signature is not at the foot, still it is at the end of the will: it is not at the beginning, nor in the middle. In the case cited by Dr. White, the will was on a printed form. I should not have entertained any doubt if the writing had been brought down to the end of the first side, and the signatures had been on the second side; but here the second side is entirely blank. However, I am of opinion that it is a sufficient execution, and I decree probate of the paper to pass.

Toker, Proctor.

Judicial Committee of the Privy Council.

NOVEMBER 27.

CHAMBERS v. WOOD.—Appeal.—Cause.—This was an appeal from the Prerogative Court of Canterbury in a suit respecting the will of Mr. Titus Wood, who died on the 18th August, 1838, a widower, aged between 80 and 90, if not between 90 and 100. His nearest of kin were, a nephew, Samuel James Wood, and a niece, Mary Chambers, wife of Henry Hobbs Chambers. By the will propounded, dated 6th December, 1837, the bulk of the deceased's property (between £10,000 and £11,000) was bequeathed to this nephew and niece, a moiety of the residue and a house being given to each. In 1804 he executed a will, by which all the property was left to his wife. She died in 1832, and he made no further disposition till the 16th August, 1836, by a will of which date he appointed S. J. Wood and R. H. Seeley executors, and bequeathed to his housekeeper, Margaret Pegrum, the interest of £3,000 Three per Cent. Reduced, for her life, and after her death to her niece, Martha Haines; to S. J. Wood the house in which the deceased lived, and £4,750 Three per Cent. Consols (which was equal to the whole residue, after deducting £2,000 Three per Cents. given to Mr. Seeley, the executor), and to Mrs. Mary Wood, the mother of S. J. Wood, and widow of the deceased's brother, the interest of £300 Stock for life. This will remained unaltered till 5th May, 1837, when the deceased executed a codicil, by which he revoked the bequest of the interest of £3,000 Stock to Margaret Pegrum, as he had that year transferred £2,000 Consols to his own and her names. On the 8th May, 1837, he executed another paper, whereby he bequeathed the house in which he lived and the furniture to Margaret Pegrum for life; to S. J. Wood the reversion of this house, that in the Curtain Road, and £4,750 Three per Cent. Consols; to Mrs. Wood the interest of £500 (instead of £300), and he revoked the appointment of Mr. Seeley as executor, and the bequest of £2,000 to him, naming S. J. Wood and John Tipper (the deceased's

A will of an aged testator, drawn by the party principally benefited, from instructions given by the deceased to a third party, under circumstances of suspicion, — the disposition being at variance with that contained in prior wills, and exhibiting omissions unexplained, — pronounced for, — the judgment of the Court below, against the will, reversed.

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Wood.

solicitor) executors, and, instead of the whole residue being given to Mr. Wood, he had half, and the other half was given to Mr. Tipper. By a will executed on the 15th May, 1837, the testator gave to Margaret Pegrum absolutely the house, with the furniture, in which he lived, for life; to S. J. Wood the reversion of that house and also the other house, £4,750 Three per Cent. Consols, and the whole residue, and appointed him sole executor, Mr. Tipper's legacy being reduced to £100; the interest of £500 Stock to Mrs. Wood, and to Miss Haines a legacy of £30 only. Mrs. Chambers, the niece, had had no intercourse with her uncle for upwards of seventeen years, and he did not know she was in existence. In March, 1837, she returned from Ireland, and in May or June she was permitted by him to remain in the house. The will of December, 1837, was propounded on behalf of Mrs. Chambers, and opposed by Mr. S. J. Wood, on the ground that the deceased was intestable at the time, and that it was obtained by undue influence.

Dec. 12, 1839.
Judgment
below.

The Judge in the Court below pronounced against the validity of this will. Nothing, on the face of the will, he observed, would lead, *per se*, to a suspicion that it was obtained by undue influence, control, or imposition; but the Court could not consider its contents alone; it must look at prior acts, and at the testamentary history of the deceased. The papers prior to that of December, 1837, shewed that the mind of the deceased was fluctuating as to the disposition of his property, and where there was such a frequent iteration of wills, it would not be improbable or surprising that the deceased, on the renewal of his intercourse with his niece, to whom he was sincerely attached before she went to Ireland, should have altered his intentions in her favour. But, although this change of intention and of disposition might not be improbable, the Court must be satisfied that it was the act of the deceased, and that he was of testamentary capacity. The evidence of Mr. Tidy, his medical attendant, shewed that there was a failure of capacity to some extent (not a total cessation), from torpidity of the brain. On the 5th December, 1837, he had an attack, which tended to

weaken his corporeal, and, to a certain degree, his intellectual faculties, considering his great age, and he was certainly (the learned Judge observed) in a state that required great care and caution in the execution of testamentary acts. It was impossible not to see that Mrs. Chambers was extremely anxious (and it was by no means unnatural) to get from the deceased a disposition in her favour. There was nothing so predominating in the claims of Mr. Wood that he should have had, at this time, a preference over Mrs. Chambers. But the Court must have, nevertheless, a credible account of the manner in which the will was prepared. It turned out, from a further Affidavit of Scripts, by Mrs. Chambers, that there was another testamentary disposition not executed by the deceased, which paper was torn into several pieces, and had been pasted together. The contents of this paper were important, for thereby Mr. S. J. Wood was to have only an interest in a certain proportion of the property for life, the principal and the remainder were to go to Mrs. Chambers. This was a most suspicious circumstance. Out of the £10,000 or £11,000, Mrs. Chambers's children were to have £3,000, and she was to have half of the residue during the life of Mr. Wood, and on his death the whole. This was a complete departure from all the previous documents, in which Mr. Wood had £4,750. As this was the foundation on which the supposed change of intention of the deceased was to depend, the Court must have a credible account of the manner in which this paper was prepared, shewing that it was not drawn out by Mr. Chambers, or by his direction. But when it appeared that persons had been inserted as executors whose names were afterwards erased, and after it was fairly written for execution, that certain marginal alterations were made, it raised a suspicion that the person by whom this paper had been drawn up had too much partisanship. Although the paper itself was not in the handwriting of Mr. Chambers, there was this alteration, that Mr. John Connelly was to be executor, and there was no proof that this was done by order of the deceased. There was another alteration, not admitted into the will of the 6th December, in the handwriting of Mr. Chambers, which was a most

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suspicious circumstance, and of which no reasonable explanation had been given. With this paper before him, the learned Judge proceeded to consider the account given by Mr. Connelly as to the instructions given by the deceased; and as to the preparation of the paper, and whether the Court could credit that account: he was the witness upon whom all the case lay, and it was admitted that he had shewn a strong desire to favour the cause of Mrs. Chambers. Connelly, who was a bricklayer and builder, deposed to his having been desired by the deceased, on the 30th August, 1837, to get a will made for him in favour of Mrs. Chambers, his niece; that he did not write any thing down, but in a day or two he communicated such instructions to Mr. Chambers, and told him to get a will made, that he might take it to the deceased; that, on calling upon the deceased afterwards, he looked coolly upon him, and told him that "there was a snake in the grass somewhere;" that the witness replied, that "the snake was in his own bosom,—meaning a party in his house,—the housekeeper;" that he recommended the deceased to halve the property between Mrs. Chambers and Mr. Wood; that the deceased said, "James Wood did not want it;" that he (witness) went to Mr. Chambers, and gave him instructions verbally to make it share and share alike, and the will was drawn up by Mr. Chambers or by somebody else. Not a syllable was said as to the motive for making this difference between the shares of the residue to Mrs. Chambers and Mr. Wood, nor as to the £500 to the housekeeper, and there was no reason given for the omission of Mrs. Wood. These omissions led to a suspicion that this disposition was not that of the deceased, but of the person employed by Mr. Connelly. On the 5th December, the deceased had an attack of some kind, which was likely to produce both bodily and mental weakness, and on the 6th this will was executed. It was impossible not to see the discrepancies between the evidence of Connelly and that of Morgan as to what took place at the execution. The mode in which the will was executed struck the Court as somewhat extraordinary. Morgan held the pen in his hand, and the deceased merely put his hand on the top of the pen.

his would not be material if the mind of the deceased
 ent with the act. If Mr. Connelly's evidence could be
 aplicitly relied upon, there would be no doubt that the
 deceased did give instructions for both papers; but the
 learned Judge could not pin his faith to his evidence, con-
 sidering his partisanship and his extraordinary conduct, so
 , upon his testimony, to be satisfied that the transaction
 carried as he described it, and there was nothing in the
 evidence of Morgan that supplied the deficiency. It was
 re, declarations were spoken to by Mr. Kennedy, the hair-
 esser; but the Court was not satisfied that, at the time of
 execution, the deceased was of sufficient capacity to do with
 ect what he is purported to have done, completely de-
 erting from prior acts, without any reason assigned.

Sir J. Dodson, Q. A., and — were heard for
 the Appellant; Theisiger, Q. C., and — for the Re-
 spondent.

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LORD COTTENHAM.—It is satisfactory that, in differing Nov. 27, 1843.
 on the judgment of the learned Judge of the Prerogative JUDGMENT.
 part, no question arises as to the principles upon which
 at judgment was founded, but only as to the conclusion
 per to be drawn from the evidence in the cause.

In administering the difficult and delicate duty of ascer-
 ing what apparently testamentary documents are really
 acts of the deceased, and as such are entitled to be estab-
 lished, Courts of Probate naturally and properly exercise
 at caution, and most particularly when it appears that
 parties to be benefited by the document produced have
 in any manner instrumental in procuring its execution.

not only do they in such cases exercise great caution in
 a particular instance, but they have laid down and act
 on certain rules for regulating their discretion. But
 e of such rules appear to be applicable to the state
 circumstances in evidence in this cause. The decision
 ned not upon any rule arising out of the facts deposed
 by the witnesses, but upon not giving credit to such
 tnesses. If the facts deposed to are to be believed,

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they will be found to exhibit a case not by any means falling within the rules laid down by Sir John Nicholl, in *Billinghurst v. Vickers*,* that, "when the capacity is doubtful at the time of the execution and there is no evidence of instructions, especially when the act is done through the agency of the party interested, the proof of mere execution is insufficient:" or by the same learned Judge, in *Paske v. Ollatt*,† that, "where the writer of the will is benefited under it to a considerable amount, there must be proof not only of the act of signing, but of a knowledge of the contents of the paper." The decision of this case will, therefore, tend neither to sanction nor to impeach any of such rules.

It may also be proper, to some extent, as the learned Judge expresses himself in his judgment in the present case, to look to the testamentary history of the deceased, and not to consider the contents of the produced will alone, but to look to the prior testamentary instruments, and consider whether it is probable or not that he should have executed testamentary acts of a different description. It is obvious, however, that this inquiry, unless conducted with due discretion, is very liable to lead to error. It must often be a speculation upon the motives and intentions of the deceased without adequate means of coming to a safe conclusion. The mere act of executing a new testamentary paper proves that some alteration of intention had taken place, and, in the absence of other proof, the extent of such alteration cannot safely be considered as raising any presumption against the authenticity of the document, if there be nothing unreasonable in the disposition itself.

In the present case, the learned Judge does not find, from a review of the former testamentary papers, any ground for suspecting any improper dealing with respect to that question. In this he appears to be well founded. At the time of the execution of all these former papers, that is, after the date of the last, which is the 15th May, 1837, the deceased appears from the evidence not to have been aware of the existence of his niece, Mrs. Chambers. He supposed

* 1 Phill. 199.

† 2 Phill. 325.

new, Samuel James Wood, to be his only near relation; that he did not, therefore, consider him as the only object of his bounty. By the will of 16th August, 1836, he gave him about half his property; by that of 8th May, 1837, he divides the residue between him and John Tipper, son; and by that of 15th May, 1837 (prior to which he transferred £2,000 Three per Cents into the joint names of himself and of Margaret Pegrum), he increased the amount of benefit given to his nephew by diminishing what he had given to others, and particularly by giving to John Tipper £100, instead of half the residue. When, therefore, he discovered that he had another relation, Mary Pegrum, in the same degree as Samuel James Wood, and intended to make a provision for her, it cannot be considered as unnatural that he should effect his object, as far as possible, by taking from a stranger rather than from his nephew, and by dividing his property equally between relations of equal degree. As to Margaret Pegrum, who transferred £2,000 Three per Cents. into their joint names as a provision for her in case she survived him, and the will of the 5th May, 1837, shews that this was intended as a substitution for the £3,000, before given to Margaret Pegrum for life, with remainder to her niece, Haines.

Ann Welch, a sister of Mrs. Pegrum, and a witness examined by Samuel James Wood, explains several of the facts; for, speaking of a time prior to that at which Mrs. Pegrum became known to the deceased, she deposes that she heard him say, when speaking of transferring money to Mrs. Pegrum, that he would not have her in the family; that he would leave Tipper out; that Mr. Wood was nothing to him, and that he did not see why he should leave him any thing.

Considering his impressions, before he knew that he had a living nephew, it is most natural that he should act upon the principle of providing for his niece, when she first became known to him.

There is certainly no direct evidence to explain the omission of Mary Wood, the mother of Samuel James Wood;

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what he had done, and, upon the witness going away, he shook hands with him, and said that he should never more put hand to paper. He then says that the deceased was fully competent, and that he knew and understood what he did, and the nature and contents of the will that he had signed.

John Morgan, the other witness, confirms this statement in every particular which relates to himself, and he is rather more detailed as to the conversation which took place; for he says that Mr. Connelly, in stating the substance of the will, said, "Mr. Wood wishes to leave the property equally between James Wood and Mary Chambers, and one house to each;" whereupon the witness asked the deceased if that was quite correct, and that he said "Yes." The witness then asked if he was agreeable to sign it, and he said "Yes; but I wish you would do it for me, my hand shakes so."

Peter Kennedy deposes to having heard the deceased, some time after the execution of this will, say that he had altered his will in favour of his niece; that he had arranged every thing for her benefit and that of her family, and that he wished he could have done more for her, and that this was said in the presence of Mrs. Pegrum and of Mrs. Haines; and although he is asked by the 24th interrogatory, whether Mrs. Pegrum, Mrs. Haines, or Mrs. Welch were not always in the room on the occasions of his attending the deceased, which he answers in the affirmative, no attempt is made to contradict the statement of Kennedy, although both Mrs. Haines and Mrs. Welch are examined.

So far the direct evidence shews an intention to make a will in favour of Mrs. Chambers, expressed in August; specific directions given in December for the preparation of a will, with the precise provisions contained in the will in question; a correct exposition of the contents at the time of the execution, and a subsequent recognition of the act.

No secrecy.

But the evidence does not rest there. The case against the will assumes a conspiracy between Connelly and Mr. and Mrs. Chambers to obtain a will in favour of the latter, at the expense of Mrs. Pegrum, Mr. Wood, and Mary Wood;

state, as he truly observes, which required great care and caution in the execution of testamentary acts.

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The evidence.

The case, therefore, must turn upon the evidence applicable to the particular transaction. Upon this, John Connolly is the first and principal witness. He says, That, on the 30th August, 1837, the deceased spoke to him about making a provision for his niece, Mrs. Chambers, and described what he intended to do, and desired him to get a will prepared for the purpose: That he communicated this to Mr. and Mrs. Chambers, and desired them to get a will prepared accordingly; but that he did not further interfere: That, a few days before the 6th of December, the deceased again mentioned the subject, saying that he had not as yet done any thing for his niece, and that, after some discussion as to what the disposition should be, the deceased, wishing to give larger benefits to Mrs. Chambers and her family than to Mr. Wood, but the witness urging the propriety of an equal division, the deceased at last agreed to adopt the course recommended, and to give one of his two houses, that in which he lived, to his niece, because she had a family, and one in the Curtain Road to his nephew, because it was next to one which his father had left him, and told him to get a will made to that effect: That he directed Mr. Chambers to do so, and that, on the 6th of December, being in John Morgan's house, who was desired to go to the deceased's house, he went there also, when Mrs. Chambers produced the will in question, handing it to the witness, and that he placed it before the deceased: That John Morgan asked him if that was a codicil to his will, to which he answered "No; it is my will:" That John Morgan then said, "What is your will? Are you aware of what you are doing?" That the witness then spoke the substance of the will, and the deceased then said "Yes:" That the deceased then asked John Morgan to sign it for him, he being himself unable to do so: That, ultimately, John Morgan helped him to sign it; it was witnessed by the witness and John Morgan; after which the deceased handed it to his niece, and told her to take care of it: That upon John Morgan going away, the deceased thanked him for

Nov. 27. *Chambers v. Wood.* of all particulars relating to it; and in the absence of such information, it is not unfair to admit every reasonable presumption against the parties who so withhold it. But it would not be reasonable to admit presumptions inconsistent with such evidence as there is relating to this paper, so far as such evidence is not inconsistent with what appears upon the face of the paper itself. The paper, as originally prepared, is consistent with the instructions stated by Mr. Connelly to have been received by him from the deceased, except as to the executors named, and the giving the house in which the deceased lived, and the furniture, immediately to Mrs. Chambers. There is no evidence by what authority these additions were made, or who suggested the proposed alterations, of giving the house in the Curtain Road to Mr. Wood, and £500 to Mrs. Pegrum; except that Mrs. Chambers, in her further Affidavit of Scripts, says that they were made at the desire of the deceased. The paper, as it originally stood, must be assumed to have been prepared by, or under the direction of, the Chambers's; but it cannot be supposed that the alterations were suggested or willingly introduced by them, as they give to others parts of the property, which, without such alterations, would have been theirs. These alterations, one of which (the giving the house in the Curtain Road to Mr. Wood) was adopted in the will now in question, seem to shew that the Chambers's were acting under some authority and control, and which it is but reasonable to suppose was that of the deceased. If Mr. Connelly is to be believed, the proposed disposition became immediately known, at least to Mrs. Pegrum, and from what the deceased is stated to have said, some difficulty must have arisen which prevented at that time its being carried into effect.

That those who are to take any benefit under a testamentary disposition should have any thing to do with the preparation of it, is naturally repugnant to the feelings of those who know how easily frauds may be practised by such means. But it must be recollected that the parties to these transactions are not of that class to whom such considerations or feelings are likely to have been familiar, and with respect

to both the prepared will of August and the executed will of December, though the Chambers's prepared, or were instrumental in procuring the preparation of, the instruments, they in both are stated by Mr. Connelly to have acted under his directions, and he alone, as he states, communicated with the deceased, and received his instructions. If this be true, the ground for suspicion is very much removed, founded as it is upon the opportunity of practising upon the infirmities of the testator, which the intervention of the third person effectually guards against. It is no part of the law of this country, that a will prepared by, and executed under the sole direction of, the party taking beneficially under it, is not to take effect;* although that circumstance exposes the transaction to deserved suspicion, and justifies the Court in requiring proof that the act was really the mind and act of the deceased. In the present case, if the testimony of Connelly be true, the act of consulting, advising, and directing was his, and that of the Chambers's only the ministerial act of preparing the instrument under his direction.

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Ground of
 suspicion much
 removed.

It is important, in considering how the history of the unexecuted paper ought to operate upon the decision as to the validity of the will executed some months afterwards, to observe that, as all the alterations made in the paper of August were injurious to the interests of the Chambers's, so the will of December was much less beneficial to them than that of August, even in its altered state. This is quite explained if the evidence of Mr. Connelly be true; but it is inconsistent with the supposition that the will of December was not the act of the deceased, but the fraudulent contrivance of the Chambers's. In this respect, the production of the paper of August has a tendency to remove the suspicions which might attach to the history of that of December.

Alterations
 favour the act.

The learned judge thought that there was sufficient of suspicion arising out of these transactions to lead to the conclusion that the evidence of the witnesses was false, for, if believed, the grounds of suspicion would be removed;

* *Paske v. Ollat.*

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 ———
Chambers v.
Wood.

but fraud is not to be presumed, and the case in support of the will of December does not depend upon the evidence of any one person. Unless Connelly and Morgan and Kennedy have sworn falsely, the will of the 6th December was the act of the deceased, and he was fully cognisant of its purport and effect. If it was not so, Connelly and Mr. and Mrs. Chambers conspired to procure its apparent execution, and they, together with Morgan and Kennedy, conspired to support it by perjury. This does not appear to be a just conclusion from the circumstances as they appear in the evidence which has been adduced, but, on the contrary, notwithstanding the want of information as to some important parts of the transactions, and the suspicions properly arising from it, there does not seem to be sufficient ground for rejecting the evidence given as false; and, if believed, it is not disputed that a case is made out for granting probate of the will of December, which, therefore, ought to be done.

Judgment
 reversed.

Judgment below reversed.*

Proctors: *Townsend*, for the Appellant; *Burchett*, for the Respondent.

Archæs Court of Canterbury.

DECEMBER 11.

Appeal from
 assentence of di-
 vorce for adul-
 tery. — Objec-
 tion to Libel of
 Appeal, that it
 alleged only al-
 lotment of ali-
 mony, the In-
 hibition stating
 that the appeal
 was from the
 whole sen-
 tence:—Held,
 that the Libel
 and Inhibition

**VISCOUNT FRANKFORT DE MONTMORENCY v. VIS-
 COUNTESS FRANKFORT DE MONTMORENCY.—*Appeal—
 Libel.***

This was an appeal from the Consistory Court of London, in a cause of divorce, by reason of adultery, brought by Georgiana Fredericka Viscountess Frankfort de Montmorency against Lodge Reymond Viscount Frankfort de Montmorency, her husband. The sentence of the judge in the Court below, delivered on the 11th July, 1843, pro-

* The Committee consisted of Lord Cottenham, Lord Campbell, Dr. Lushington, Sir J. L. Knight Bruce, V. C., and Sir J. Wigram, V. C. *absente* Lord Brougham.

nounced that the Libel had been fully proved, and decreed the separation of the parties, at the same time proceeding to allot £550 by way of alimony pending the suit, and £800 per annum as permanent alimony from the date of the sentence. From this sentence of separation and allotment of alimony the Proctor for Lord Frankfort alleged an appeal ; the Inhibition of appeal was from the whole sentence, and a Citation was taken out accordingly. The Libel of Appeal, however, alleged as the only ground of appeal the allotment of alimony. The admission of this Libel was opposed.

Dxc. 11.

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Frankfort.

should agree,
and, conse-
quently, the Li-
bel directed to
be reformed.

Sir John Dodson, Q. A., for the Respondent, in opposition to the Libel.—The Libel is inconsistent with the Inhibition and Citation. The Court should have the whole proceedings before it in order to decide the question respecting the allotment of alimony, and the Monition for process will bring up only that portion which relates to the alimony. The appeal was from the whole sentence.

ARGUMENT.

Elphinstone, D., on the same side, cited *Street v. Street*.*

Jenner, D., in support of the Libel. It is true, we did appeal from the whole sentence, but we now state that we only intend to proceed on the question of alimony. [PER CURIAM. You appealed from the whole sentence: what am I to do with that appeal ?] It may be considered as an informal relaxation of the Inhibition. If we had appealed *apud acta*, it would not have been necessary for us to proceed upon the whole sentence. [PER CURIAM. If you appeal from the whole sentence, the Court must pronounce its judgment upon the whole sentence:—how am I otherwise to get rid of it ? The appeal from the whole sentence remains till this Court disposes of it. Your Libel does not allege the true ground of appeal.] What we now appeal is the allotment of alimony as too large. In *Lloyd v. Poole*,† the appeal was from the whole sentence, and became in this Court only an appeal on the ground of costs. In *Greg v. Greg*,‡ the Court said it was no objection to the Libel of Appeal that it introduced matters not appealable. All the matters in this case were one act, done on the same day.

* 2 Add. 4.

† 3 Hagg. 477.

‡ 2 Add. 276.

DEC. 11.
 —
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Frankfort.

Harding, D., on the same side. An appeal *apud actis* is an appeal from the whole sentence; but a party may prosecute the appeal as to one part and abandon another. [PER CURIAM. But you *have* appealed from the whole—that is the difficulty.] If the Court inferred that the appeal was only for alimony, it might pronounce that the party had deserted his appeal as to the rest.

JUDGMENT.

SIR H. JENNER FUST.—It is not a very usual proceeding to take objections to the admission of a Libel of Appeal; but cases have occurred in which such objections have been taken and in which they have been upheld. The Court, therefore, not only on general principles, but by practice, may consider and determine whether the objection in this case is rightly taken or ought to be overruled.

It is certainly a very inconvenient mode of proceeding to make an allotment of alimony pending the suit, as well as of permanent alimony, on the same day that the final sentence was given in the cause, the suit being at an end when the sentence of separation was pronounced. From the sentence in the Court below an appeal was alleged, and an Inhibition was taken out, by which the hands of the learned judge were completely tied, as the appeal was from every part of the sentence; for by the Inhibition it appears that the Appellant had in due time and place appealed from the whole sentence, “and especially from the said Judge having read, signed, promulged, and given, the sentence corrected by the Proctor of Lady Frankfort, whereby he did pronounce and declare that Lady Frankfort ought by law to be divorced and separated from bed, board, and mutual cohabitation with Lord Frankfort, her husband, and did allot the sum of £550 alimony during the dependence of the suit, and the sum of £800 per annum as permanent alimony, and from every thing following or arising therefrom.” Therefore, in point of fact, the whole sentence was appealed from, including the sentence of separation, and the allotment of alimony pending suit and of permanent alimony, and Lady Frankfort was cited to appear to answer her husband in an appeal from the whole sen-

The whole sentence appealed.

tence, the hands of the judge below being tied up as to every part of the case.

DEC. 11.

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Frankfort.*

An appearance was given on behalf of Lady Frankfort to this Inhibition and Citation ; a Libel was brought in, and this Libel, in the first place, pleads that there was lately depending in judgment before the Court below a cause of divorce, by reason of adultery, between Lady Frankfort and her husband ; secondly, that the judge of that Court “ did, in fact, though unduly, on or about the 11th July, 1843, by his decree, allot the sum of £550 by way of alimony during the dependence of the suit, and also the further sum of £800 per annum as or by way of permanent alimony ; and did direct the same to be computed from the said 11th July, being the date of the sentence given by him in the aforesaid cause in the said Court, contrary to law and justice.” So that the Libel here sets forth a part of the sentence only, namely, the allotment of alimony. The third article alleges “ that the Proctor of Lord Frankfort, in the said Court, looking upon and believing his party to be very much injured and aggrieved by all and singular the nullities, &c., hereinbefore pleaded, and justly fearing that his said party may be further injured and aggrieved thereby, hath rightly and duly appealed from them and every of them,”—that is, from all that is set forth in the second article of the Libel, but not a syllable is said as to the final sentence ; so that the Court is left quite in the dark as to the sentence of separation. This is not the usual course of proceeding ; it ought to have set forth that the judge pronounced a sentence of separation. [*Jenner*. It was not done so in *Westmeath v. Westmeath*.*] Very likely not ; but that was a peculiar case. [*Sir John Dodson*. The appeal in that case was for alimony, and the Inhibition was for alimony only.] The third article alleges an injury and a grievance, by what ? by the allotment of alimony : “ and more especially,”—which is the *præsertim* of the appeal, to which the Court always looks,—“ from the said judge having, on the said 11th July, 1843, by his decree, allotted

* 2 Hagg. E. R. 138, Supp.

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Frankfort.

Libel and In-
 hibition must
 agree.

the sum of £550 as or by way of alimony, during the dependence of the suit, and also the further sum of £800 per annum as or by way of permanent alimony, to be paid by Lord Frankfort to Lady Frankfort, and from his having directed the same to be computed from the said 11th July, 1848, being the date of the sentence given by him in the aforesaid cause, in the said Court, and from every thing that shall or may arise or follow therefrom." And that is the ground of appeal. Why, then, the Libel of Appeal and the Inhibition do not agree, as the Inhibition alleges an appeal from the whole sentence; whereas the Libel alleges an appeal from only a part of the sentence. Which is to be taken—the Inhibition or the Libel? It is said that no authority has been pointed out, to shew that the Libel of Appeal and the Inhibition should agree; but I apprehend no authority is necessary on this point, as it is every day's practice. I never recollect any case to the contrary. Nothing could be more easy than to make the Inhibition and the Libel agree, for the Libel could recite that the appeal was from the whole sentence, but that part, and stating what part, had been abandoned. Here, however, the party and the Court are left to inference as to what part of the appeal it is intended to abandon; and at the hearing it would appear as if it were an appeal from the whole sentence, whereas it is an appeal from only part.

Libel to be
 reformed.

Under the circumstances I am clearly of opinion that the Libel is not admissible in its present form, as it is at variance with the Inhibition, and the hands of the Court below are completely tied up as to every part of the cause till the Inhibition is relaxed. I am of opinion that the Libel must be reformed.

Proctors:—*Pritchard*, for the Appellant; *Jenner*, for the Respondent.

High Court of Admiralty.

DECEMBER 12.

The "*VIRGIL*."—*Act on Petition*.—This was a cause of Collision.—
 image by collision. The *Virgil*, a snow, of 240 tons, and A vessel doing
 the sloop *Jean*, of 150 tons, deeply laden with coals, on the damage cannot
 evening of the 6th of October last, it being dark (and, as plead "inevita-
 ascribed on one side, hazy), came in collision near Coquet ble accident"
 island, and the *Jean* sunk. On the part of the *Virgil*, it if, in a dark or
 was contended that the collision was the effect of inevitable hazy night, she
 accident; the owner of the *Jean* maintained that the *Virgil* carries much
 was to blame. sail, and goes
 at great speed,
 neglecting mea-
 sures of precau-
 tion that would
 have rendered
 the accident
 less probable.

The Court was assisted by Trinity Masters.*

Addams, D., and *Harding*, D., for the *Jean*; *Haggard*,
 D., and *Robinson*, D., for the *Virgil*.

DR. LUSHINGTON (addressing the Trinity Masters).—SUMMING UP.
 The facts of this case are very simple in themselves. As
 alleged on behalf of the *Jean*, they are shortly these:—She
 was proceeding north, and had put into Shields. On the 6th
 of October, about six o'clock in the evening, she was about
 three miles, or three miles and a half, off the Coquet Island
 light, and the place is admitted on the part of the *Virgil*,
 and fixed beyond all doubt. On the part of the *Jean*, it is
 stated that the wind was N.W. and by W.; that her course
 was about N.; that she was on the larboard tack, and pro-
 ceeding towards her destination, when she met with the ves-
 sel, and descried her on her starboard bow; and the repre-
 sentation of the *Jean* is, that it was out of her power to
 change her course, being on a wind, and that the other vessel
 ran into her and sank her. The defence on the part of the
Virgil is, in some respects, of an extraordinary description,
 because, after having stated her own voyage and the place
 of the collision, she goes on to say, that the night was hazy
 and very dark, and that a good look-out was kept. But it is
 extraordinary that in this, which ought to contain the whole

* Captain Locke and Captain Weller.

Dxc. 12.
The Virgil.

of the defence, there is not a single word said as to the wind, as to the rate at which the vessel was sailing, as to the tack which she was on, as to the course she was pursuing, as to which bow was struck, and as to what sails were set. I must say that this struck the Court with a considerable degree of surprise, and not only surprise, but it does put a very great difficulty in the way of the case of the *Virgil* herself; because we must hold, that the whole of the defence, and all the essential particulars, should be stated in the first instance, otherwise the affidavits go to matters which never can be met on the other side.

This being the state of the case, the substance of the defence, as pleaded on behalf of the *Virgil*, is—inevitable accident, a dark and hazy night, and no power on her part to avoid the collision. Now, let us consider what is really the fact.

What is in law
"inevitable accident."

In law, an inevitable accident is this: that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. It is not inevitable accident if a vessel is going eight or nine miles an hour when she ought to be sailing three or four, and say, "I could not prevent the accident at the moment it occurred;" but could she not have used measures of precaution, that would have rendered accident less probable? That is the doctrine which I take the liberty of enforcing as the doctrine of this Court. Though it is important that a voyage should be completed in the most speedy manner, yet speed must be combined with safety to other vessels.

Now, there are only two points in which to my mind it is possible to impute to the *Virgil* any want of propriety of conduct; and the first is, was there a good look-out? I am not prepared to say, negatively, that a good look-out was not kept. But a more important matter is, whether she was or was not carrying more sail than, under the circumstances stated by herself, ought to have been carried. She clearly had the wind free, and the night was not only dark, but hazy, and that fact must tell against her as well as in her favour.

Now, you will have to consider, then, whether, under all these circumstances, the *Virgil* was to blame, and not the innocent cause of this collision—but has so conducted herself with respect to the quantity of sail she was carrying, that, in point of fact, she rendered the accident more probable than it would otherwise have been.

DEC. 12.
The *Virgil*.

CAPTAIN WELLER.—It appears that the wind was about N.W. and by W. The *Jean* was close-hauled on the larboard tack. The *Virgil* was steering S. $\frac{1}{2}$ W., the wind two points abaft the beam, having her studding-sail set. Both admit it was a dark night; the *Virgil* says “hazy.” If so, we consider the *Virgil* ought to have been under more command, particularly on a coast where there is so much traffic. We consider her to blame.

OPINION.

PER CURIAM.—I entirely concur in the opinion expressed by the Trinity Masters; therefore, I pronounce for the damage.

JUDGMENT.

Proctors:—*Wadeson*, for the *Jean*; *F. Clarkson*, for the *Virgil*.

THE “LONDON PACKET.”—*Act on Petition*.—This was likewise a case of collision. The brig *Hull*, of 116 tons, laden with coals, proceeding from the north to London, and the schooner *London Packet*, of 94 tons, in ballast trim, from Rye to Sunderland, came in collision at the mouth of the Tees, on the night of the 1st June. Each party charged the other with being the cause of the collision; but the *London Packet* having sustained slight damage, her owners had not instituted a cross action.

Collision.—
The rule of the Trinity House does not apply where the heads of the two vessels are not in opposite but different directions.

The Court was assisted by the same Trinity Masters.

Addams, D., and *Robertson*, D., for the *Hull*, and *Haggard*, D., and *Twiss*, D., for the *London Packet*.

DR. LUSHINGTON.—It is admitted on both sides that this was not a case of inevitable accident, but must have occurred in consequence of blame attributable to one or the other of these two vessels.

SUMMING UP.

The statement on behalf of the vessel proceeding, the *Hull*, is to the following effect. She had quitted the port of

The facts.

Dxc. 12. *London Packet.* Middlesborough for London, and after having cast off the steam-tug, by which she had been conducted out of that port, the wind being directly contrary to the course she was intending to pursue, she states that, "in consequence of the head-wind, she stood to the N., on the starboard tack, and continued on such tack till noon, when she tacked to the S., on the larboard tack, on which tack she continued till four P.M., when she again tacked to the N. and E., on the starboard tack, and continued on such tack until half-past seven P.M., when the wind gradually died away, so that at half-past eight P.M. the brig became totally becalmed." The representation is, that, during the whole of this day, the wind did not blow from such a quarter as to enable the master to make any progress towards the completion of the voyage. He states that, "at such time, it was ebb-tide, and, in consequence of the swell of the sea, the brig was thrown athwart the tide, with her head to the N. and E., her helm being lashed, in which condition she continued until ten o'clock P.M., when, a light air having sprung up from the S., her yards were braced sharp up, on the starboard tack, her helm was put hard to starboard, and her head brought up to the wind, namely, S.E." Now, as I understand it, the vessel, until a very short period, at least, prior to the collision, lay with her head to the S.E.; but, "notwithstanding which," he says, "the brig, for want of sufficient wind, was still unmanageable." At half-past eleven o'clock, the schooner (the vessel proceeded against), bound for Sunderland, "was seen by the watch on deck, about a quarter of a mile off, coming down upon her with all sail set from the S., and bringing with her a breeze from the S.S.W." Now, I wish particularly to call your attention to this statement; you will be able to judge whether it is true in point of fact, and whether the measures adopted by the two vessels were the correct ones. But the statement here is, that the head of the brig was to the S.E., and, being in this predicament, a vessel came down on her with all her sails set from the S., bringing a breeze from the S.S.W., and he states that the breeze had not reached him at the period of the collision; and, in point of fact, he was at that

time in an unmanageable condition, so that he could do nothing.

DEC. 12.

London Packet.

On the other hand, the statement is, that the schooner was proceeding to the N. ; that about half-past eleven P.M. she was crossing the mouth of the Tees, with the wind moderate from the S.W. and by W., with all sails set except the studding-sails, and her course appears to have been N.N.W. $\frac{1}{4}$ W., therefore, she had the wind in her favour ; that, so proceeding, she descried the brig (for it is not pretended that this was a dark night, on the contrary, all the evidence shews that there was a capability of seeing at some distance) ; that the helm of the brig was put to starboard ; the helm of the schooner was put to port, and notwithstanding that the master hailed those on board the brig to put her helm a-port, she continued to bear down upon the schooner, and came stem on, and struck the larboard bow of the schooner.

A great deal has been said about the rule laid down by the gentlemen of the Trinity House ; that rule has been

The rule of the Trinity House.

recognized over and over again, and I hope never will be departed from in any case where it applies. That rule I apprehend to be this : that where one vessel is upon the starboard tack, and another on the larboard tack, it ought to be the custom of the vessel on the starboard tack to keep her wind, and of that on the larboard tack to give way.

But this presumes that the head of each vessel is opposite to each other ; it is not intended to apply if the heads of the vessels are lying in different directions. It is only applicable in cases according to the rules of navigation. If the brig was lying with her head to the S.E., then in point of fact the two vessels were not approaching each other, and it is, therefore, a very different consideration whether, under circumstances of that description, the *London Packet* ought to have ported her helm or not ; and it will be very important, also, to consider whether the people on board the brig could have done any thing to avoid the accident.

When applicable.

CAPTAIN WELLER.—The *London Packet* had a fair wind abaft her beam, and commanded steerage-way. Had she continued her course N.N.W., she would have passed to the windward of the brig—that is, astern of her. We, there-

OPINION.

DEC. 12. fore, consider that the collision was occasioned by the injudicious act of the schooner, in attempting to cross the brig's
London Packet. hawse.

JUDGMENT. PER CURIAM.—I pronounce for the damage.

Proctors:—*F Clarkson*, for the *Hull*; *Tebbs*, for the *London Packet*.

Consistory Court of London.

DECEMBER 16.

Protest against appearing to a Citation in a suit for separation by reason of adultery, by the wife against the husband, on two grounds: first, that the proxy was not signed by the wife till after the Citation was extracted and served; secondly, that the husband, though residing in the diocese when the Citation issued, was served abroad:—*Overruled on both points.*

COLLETT v. COLLETT.—*Act on Petition.—Protest.*—This was a suit for separation, by reason of adultery, by Mrs. Emma Collett against Mr. John Collett, her husband. A Citation was taken out on the 22nd September, citing the husband, as resident in the parish of St. George, Hanover Square, in the diocese of London. The certificate of service, dated the 4th October, set forth that the person employed to serve the Citation had proceeded on the 25th September to the house, 7, Upper Belgrave Street, for the purpose of serving the Citation, but was informed by Mr. Collett's agent, then in the house, that Mr. Collett was gone abroad; that having ascertained that such information was correct, he proceeded to Ostend, and, on the 27th September, met him at Malines, in the Netherlands, and producing the original Citation, left with him a copy. The husband appeared by Proctor under Protest to the jurisdiction of the Court, alleging that, by the 129th Canon, it was decreed that none shall procure in any cause unless constituted and appointed by a proxy from his party; that when the Citation issued—namely, on the 22nd September, and when the pretended service took place, on the 27th September, the Proctor extracting the same was not lawfully constituted the proctor of Mrs. Collett, who did not execute the proxy till the 2nd October, by reason whereof the Citation was not duly or lawfully procured. And, further, that the jurisdiction of this Court, in respect of the Citation, is limited to the dio-

cese of London, and that a service thereof can only be lawfully effected upon the party within the jurisdiction, and, being served upon the party when he was out of the jurisdiction, and in foreign parts, the Citation and service were null and void.

DEC. 16.

Collett v. Collett.

Haggard, D., for Mr. Collett, in support of the protest. ARGUMENT.

—The first ground is, that there was a suit pending prior to the proxy, in express violation of the Canon. It has been decided that the service of the Citation is the commencement of the suit. *Ray v. Sherwood*.* Certain orders were passed, in pursuance of the Stat. 10 Geo. 4, c. 52, by the Court of Arches, for the regulation of these Courts, and the 5th of these orders† directs “that the proctor of a party taking out a Citation, or other process, shall, on the day of its return, be prepared to exhibit his proxy, and to proceed in the cause, by taking the first step therein, according to the nature of the proceeding.” So far from this rule superseding the Canon, it confirms it, and shews that, at the time of the return of the Citation, the proxy is to be exhibited and registered in the Court. But, assuming the proctor to have been duly authorized, there has been no due service so as to compel an appearance. By the Statute of Citations,‡ no person is to be cited out of the jurisdiction where he shall be inhabiting at the time of the award of the Citation. It is alleged that Mr. Collett is residing in Belgrave Street, Hanover Square: why was he not served there? Mr. Collett is in a foreign country, and till of late, writs of the Court of Chancery could not be executed in Scotland or Ireland. There is no case in which service of a Citation upon a husband out of the jurisdiction of the Court of the Ordinary, by virtue of its own seal, and by an officer substituted for the legal mandatory, has been held to be a legal service, after argument. I am aware that cases have occurred where, *sub silentio*, an appearance has been given, or a Citation *viis et modis* has been held sufficient to found the jurisdiction of the Court, which has proceeded in *pœnam*.

* 1 Curt. 193.

† Reg. 5.—13th February, 1830.

‡ 23 Hen. 8, c. 9.

DEC. 16. There is also another class of cases, in which the domicil of the husband has been held to be that of the wife. *Whitcomb v. Whitcomb*.^{*} *Warrender v. Warrender*.[†] But they are cases in which a nullity was cured by the application of that doctrine. [PER CURIAM.—With regard to the principle that the domicil of the husband shall be considered *prima facie* the domicil of the wife, and therefore, service at his house shall be considered the same as if he resided with her, why is it so? because the law holds that her proper residence is within the jurisdiction by reason of her husband being resident therein. But if the residence of the husband in this case be *de facto* and *de jure* within the jurisdiction, surely the same principle applies to him.] The question is, whether the Court can uphold the service of the Citation on the husband, he being at the time out of the jurisdiction. [PER CURIAM.—The very point was decided in *Warrender v. Warrender*. The Citation was served in France. For what purpose is the service but to give him notice?] Is the notice of any avail unless he is within the jurisdiction? No case has gone beyond the extent of binding the wife, who is presumed to be on the spot. [PER CURIAM.—Must I not assume the same as to the husband?] The Court cannot serve a party in another diocese, and can it serve a party in a foreign country?

Bayford, D., on the same side.—There has been no service of any sort but on the person locally out of the jurisdiction of any Court in this kingdom. The Citation must be a legal document, and requires a legal service.

Phillimore, D., *contra*.—As to the first question, the object of the Canon is to protect clients from the misconduct of their own proctors. With respect to the 5th Rule of 1830, the proctor has complied with it, for on the day of the return of the Citation he was prepared to exhibit his proxy. *Prankard v. Deacle*.[‡] With respect to the domicil of Mr. Collett, in *Whitcomb v. Whitcomb*, the Court decided the question, which was before decided in *Warrender v.*

^{*} 2 Curt. 351.

[†] 9 Bligh, 89.

[‡] 1 Hagg. E. R. 183.

Warrender and Tenducci v. Tenducci.^{*} This is only a notice to enable us to put the party in contempt, if necessary. DEC. 16.

Addams, D., on the same side.—It is not necessary that the Citation should be taken out by a proctor; it may be done by the party herself, or a friend, and it is sufficient if the proctor exhibit a proxy at the return of the Citation. *Collett v. Collett*.

DR. LUSHINGTON.—This is a case of some importance, as JUDGMENT. I do not recollect such a point ever having been raised in an Act on Petition. A Citation was taken out by the wife against the husband, on the 22nd September, and the returns as follows :—

I the undersigned do hereby certify that, on Monday, the 25th day of September last, I proceeded to the house, No. 7, Upper Belgrave Street, in the parish of St. George, Hanover Square, in the county of Middlesex and diocese of London, for the purpose of serving this Citation on the within-mentioned John Collett, Esq., but that I was informed by his agent, who was in the said house, that the said John Collett was gone abroad. And I do further certify that, having ascertained that such information was correct, I proceeded to Ostend, and, on the 27th day of the said month of September, met with the said John Collett at Malines, in the Netherlands, and then and there produced this original Citation under seal to him, and left with him a true copy hereof, he being personally known to me. Witness my hand, this 4th day of October, 1843. Jno. Forrester.

The Citation is in the ordinary form, and Mr. Collett appears under protest to the Citation upon two grounds; first, that the Citation was taken out before the proxy was signed by Mrs. Collett, and secondly—I will read the very words of the Act :—“ That the jurisdiction of the Consistorial and Episcopal Court of London for and in respect of the said Citation is limited to, and does not extend beyond, the said diocese of London, and that a service of such Citation can only be lawfully effected (in virtue of the seal under which the said Citation issued) upon the party therein named to be cited, in and within the jurisdiction of the said Court.” So that the ground of nullity is, that the service was abroad. Grounds of protest.

^{*} 3 Phill. 595.

Dec. 16.
Collett v. Collett.

Jurisdiction
of Court over
cause.

Now, it appears to me indispensable in this case, first, to see what jurisdiction the Court had over the original cause. The evidence before the Court, as to the jurisdiction, consists of two affidavits. One is made by Mrs. Collett herself, stating that she resided with Mr. Collett at No. 7, Upper Belgrave Street, within the jurisdiction of the Court, up to the 14th June, 1836, when she left the house, and that Mr. Collett has continued to occupy and reside at the said house up to the month of September in the present year, when, on or about the 25th of that month, he left London for the Netherlands, leaving his servants in charge of the said house, and she believes that Mr. Collett is shortly expected to return. Now, there being no contradiction to this affidavit, the facts appear to be these: that the Citation is dated on the 22nd September, and Mr. Collett quitted the house on or about the 25th, three days after the issue of the Citation, and two days before the attempted service. The other affidavit is made by Mr. John Henderson, the collector of the poor rates for that part of the parish in which Upper Belgrave Street is situated, and he says that Mr. Collett has been for many years, and now is, assessed to the said rates as the occupier of a house numbered 7 in that street.

Under these circumstances, has this Court jurisdiction to proceed? I am aware that this point has not been contested by the Counsel for Mr. Collett, who have admitted that the Court has power to decide in the cause. Now the Court always looks, in questions of jurisdiction, to the Statute of Citations, for although that Statute was only in affirmance of the Common Law, yet it is the written law by which the Court must govern and regulate its proceedings. The Statute was passed to prevent abuses which had taken place by reason of Citations and other process to appear in the Archdeacon and other high Courts of the Archbishop, being served "far from and out of the dioceses where the parties dwell;" not where they might happen to be at the time of issuing the Citation, but "out of the diocese where they dwell;" and there can be no doubt as to the meaning of the word "dwell," that it means "permanently residing:" no other clause of the Act gives a different meaning to the word. In

he enacting part it is said, "No manner of person shall be from henceforth cited, or summoned, or otherwise called to appear, out of the diocese where he shall be inhabiting at the time of awarding or going forth of the citation." Now, at the first place, I think the word "inhabiting" has the same meaning as the word "dwelling" in the former part of that Statute. The word "inhabiting" is one to which very one knows many meanings have been attached, and a precise meaning can only be collected with reference to the circumstances of each individual case.

DEC. 16.

Collett v. Collett

Now, if I am to look at this case with a strict eye, there can be no doubt that Mr. Collett was in the house at the time of the going forth of the Citation on the 22nd September. Such being the words of the Statute, what is the construction put upon them in other Courts? One case has been cited from Burn's Eccles. Law;* I have had reference to the original Reporter,† and I find the citation is word for word: "8 James. An attorney in the K. B. was cited in the Arches for a legacy, and, for that he inhabited the diocese of Peterborough, Prohibition was prayed and granted; because, though he remained here in Term time, he was properly inhabiting within the jurisdiction of the bishop of Peterborough:" plainly shewing that, in the opinion of a Court of Common Law, the true construction of the Statute is, that it is not by accidentally, and for a single purpose, inhabiting within the jurisdiction, but for the general purpose of habitation in the place, that the jurisdiction of the Ecclesiastical Court would be founded. Upon the nature of this case, being a transitory action, I look upon this as an authority very much in point. The case

Woodward v. Makepeace‡ is not so much in point, but, to a certain extent, it illustrates the present. In that case, it appeared that Woodward was cited out of the diocese of Lichfield and Coventry, having been cited in that of Peterborough; but the Court held that he was not cited out of the diocese, within the Statute, for that he was an inha-

* Tit. "Citation."

† 2 Brownl. 12.

‡ 1 Salk. 164. Cited by Burn, *ut sup.*

Drc. 16. *Collett v. Collett.* bitant where he occupied land as well as where he personally resided. And, in the present case, the party occupies a house within the diocese, and actually resided there both before and at the time of the Citation being taken out. What was the course pursued by Lord Stowell in Lord and Lady Herbert's case? According to the report of that case,* the evidence was very much the same as this, as to the actual residence of Lord Herbert at No. 10, Upper Seymour Street, up to the day of the affidavit, and Lord Stowell did not hesitate to pronounce Lord Herbert in contempt, and when he was in contempt, to proceed to a hearing. There was not a personal service in that case, but a service *viis et modis*, by leaving a copy of the Citation at the house. What was done in even a more important case, that of *Taducci*? That was a suit brought, after the party, who was a foreigner, had quitted this country, by reason of his having a residence in the Haymarket. He was pronounced in contempt, and that was a suit for the purpose of annulling a marriage, not for a separation by reason of adultery, and it went to a final sentence, the Court stopping the cause till he had had notice. So that this was a decision of the Court of Arches itself. The party was living in Naples, and this is an answer to the argument that the Court has no power to issue its process out of the kingdom, for the Court of Arches there issued its process to the kingdom of Naples. But in fact it is not a process at all, and it is a misnomer to call it so; it is notice of process.

Objection only to service of Citation. It is clearly demonstrated, therefore, that this Court had jurisdiction at the issue of the Citation. What then does the whole argument amount to? Why, that the Citation was not properly served, and that is the sum-total. I should be glad to know what would have been a proper service. I expected to have been told that a copy of the Citation ought to have been left at the house in Belgrave Street, and then, without any notice to Mr. Collett at all, the party might have proceeded, by a preliminary measure, to move the Court to pronounce Mr. Collett in contempt. But we have

* 2 Phill. 230.

heard any such argument. In ordinary cases, the practice is to leave a copy of the Citation at the place where the party was resident at the time; but for what purpose is a copy left at the house? For one only; because it is most proper that, by that means, the party may obtain a personal knowledge of the proceedings in the cause. The law is intended to the party plaintiff, and gives that party an opportunity of going on by leaving a copy at the residence of the other party, and it is not absolutely necessary to serve the process upon the individual wherever he can be found. In lieu of personal service, and nothing more. This is the foundation of the whole objection. How was the objection treated in *Warrender v. Warrender*? The case of *Warrender v. Warrender* is an authority upon this point, the only difference between the cases being this, that, in that case, it was a proceeding by the husband against the wife, and this proceeding by the wife against the husband. The case of Sir George and Lady Warrender was this: Sir George, then resident in Scotland at the time, took out process in the Court of Session in Scotland, calling upon his wife to appear in a cause of divorce by reason of adultery. The proper mode of proceeding was by edictal process, and this process should have been served at his own residence in Scotland: that would have been according to the strict rule of proceeding, the law presuming that the domicile of Sir George Warrender was the domicile of Lady Warrender. Instead of so doing, Sir George Warrender caused the Citation to be served upon his wife in France. An objection to this service was taken in the Court below (the Court of Session), it being overruled, the case was brought up by appeal to the House of Lords for decision. And how did Lord Brougham, with the concurrence of the Lords, treat the objection? He said, could there be an argument more fully approaching to the *reductio ad absurdum*? The edictal process was admitted to be for the purpose of giving notice, and when, in point of fact, you do give notice, as though as if given at a market-cross in England, by a personal notice on the party, you come and tell me that it would have been better to have adopted other means, by a service

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Warrender v. Warrender.

DEC. 16. *Collett v. Collett.* in Scotland, which could not possibly have had any effect, the lady being resident abroad. [*Addams.* Lady Warrender had never resided with Sir George Warrender in Scotland; it was only a temporary, not a permanent residence.] Is not that case applicable to the present? Does the circumstance of this being a suit by the wife against the husband make any difference? I think it does, but most strongly the other way. Look at the facts in that case. The service was held to have been a good service, though the Court of Session could have had no more power to serve its process in France than this Court. But what was that case? Why, by a fiction of law only, it was held to be sufficient, as against the wife, to serve it upon her residing in France, and here, where there is no fiction of law, but the husband is resident on the spot in law and in fact, has he a right to say that a personal service is not good? I am not able to understand the drift of that argument. I think, if the wife is bound, *a fortiori*, the husband is bound, and that it does not lie in his mouth to say that, although the wife is bound, though not resident, he shall not be bound though resident on the spot. All rules of law depend upon the principles of common sense, and has he not the information communicated to him as effectually as if a copy had been left at his house? Looking at all the facts of the case, I am of opinion that, so far as regards the objection to the jurisdiction of the Court, I must overrule it.

Want of proxy. With respect to the second point, it is alleged that I ought to pronounce for the protest on the ground that the Proctor, at the time of issuing the Citation, had no proxy from Mrs. Collett, the party proceeding, and I have been referred to the 129th Canon as a proof that this objection is well founded. I must dismiss this objection. I say nothing about the Canon as a law, except that the Canon is directory, and cannot annul any of the proceedings, and so far I cannot on this point pronounce for the protest. It cannot be supposed that, when a regulation has been laid down of a directory nature, for the government of Proctors, if one of them happen to violate such direction, all the proceedings between the parties are to be quashed and annulled,

for there is not a syllable in this Canon which tends to shew that the proceedings in case of a disobedience to the directions of the Canon are void.

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I think it my duty to overrule this protest, and in compliance with the prayer of the other party, assign Mr. Collett to appear absolutely. Protest overruled.

Proctors: *F. H. Dyke*, for the wife; *Moore*, for the husband.

Prerogative Court of Canterbury.

DECEMBER 18.

HATCHWELL v. HATCHWELL.—*Cause.*—The testator, Charles Hatchwell, died on the 5th October, 1842, and probate of his will was granted on the 15th October. By it he bequeathed to his five children £5 each, and the residue to his widow, the property being under £200. On the 10th October, 1843, a decree was taken out at the suit of three of the children, calling in the probate, and putting the parties upon proof of the will in solemn form of law. The will was accordingly propounded in a *condidit*, upon which the two attesting witnesses were examined. One of them (Cleland) deposed to the competency of the deceased, but the other (Godby), who was the drawer of the will, deposed that he did not believe that the deceased understood the contents. Capacity.—Probate of a will being called in, the drawer (one of the two attesting witnesses) deposed to the incompetency of the testator, the other to his competency:—Held, under the circumstances, that there was sufficient evidence in favour of the validity of the will.

Addams, D., moved the Court to pronounce for the will, and condemn the party opposing it in the costs. ARGUMENT.

Jenner, D., for the party opposing.—Almost all the property is given to the wife; there were no instructions from the deceased, and, according to Godby's statement, he wrote the paper without any communication with the deceased, and left it with the widow for two or three weeks before it was executed. The account given of the execution does not state that any remark or observation was made by the testator shewing that he had a knowledge of the contents. Cleland says he held it up, as if he was reading the paper

DEC. 18.
 Hatchwell v
 Hatchwell.

over; but the other witness says directly the contrary. [PER CURIAM.—I cannot take Godby's evidence; I throw him out of consideration; I repudiate him.] Then take the account given by the other witness as to the capacity of the deceased; looking at his age, eighty-one, and at the trifling legacies to the children, there is nothing to shew that he knew he was signing a will.

JUDGMENT.

SIR H. JENNER FUST.—I would advise Mr. Godby to take very good care what he does in future. The question is, whether the evidence of Cleland is sufficient to support the will. The requisites of the Statute are complied with—that is, the paper was executed in the presence of two witnesses present at the same time, who attested the paper in the presence of the deceased; and the question is, whether there is proof of knowledge of contents. Generally speaking, where a party executes a will in the presence of witnesses, that is *prima facie* proof of his knowledge of the contents, and the Court considers the deceased to have been of sound mind. And what is there to impugn the capacity of the deceased in this case, except what comes from Godby? I doubt whether, under the circumstances of this case,—looking at the fact of the probate having been so long without being called in, and at the evidence of Godby, on whose evidence it has been called in, and who has admitted that he has quarrelled with the widow,—I should be justified in pronouncing against the validity of this will, there being no plea of want of capacity. I am inclined to consider that there is sufficient evidence of the execution of the will by the deceased with knowledge of contents, and I therefore pronounce for the validity of the will, and condemn the party opposing it in the costs. It is clear that they must have known what Godby could say. I do hope that some means may be devised to prevent such cases in future. Taking his evidence in the most favourable light, he is a party to a fraud.

Proctors :—*Buckton*, for the party opposing the will; *Crosse*, for the widow.

High Court of Admiralty.

DECEMBER 20.

THE "FORTITUDE."—*Act on Petition.—Protest.*—This is a proceeding on behalf of Messrs. Pease and Co., of all, mortgagees of 48 sixty-fourth shares of the ship *Fortitude*, which had been arrested by process of this Court in suit for wages against the ship, the present action being against the ship and freight. James Douglas, the master, owner of the remaining 16 sixty-fourth shares, and the consignees of the cargo, appeared and gave bail for the freight, but under protest. The Act on Petition alleged that Thos. Humphrey the elder, of Hull, the owner of 48 sixty-fourth shares of the ship, mortgaged them to Messrs. Pease and Co. in August, 1841, and in October, 1841, the vessel sailed under the command of Douglas, on a voyage from London to South Australia and the China Seas, and back to London; that, during the voyage, Humphrey the elder became bankrupt; that the vessel returned to London with a valuable cargo in June, 1843, Douglas, the master, being at such time the only solvent owner; that the mariners, being unable to obtain payment of their wages, commenced actions against the ship in this Court, which were now pending; that, by the Statute 3 and 4 Vict. c. 65, it is enacted (sect. 3), that "whenever any ship or vessel shall be under arrest by process issuing from this Court, or the proceeds of any ship or vessel, having been so arrested, shall have been brought into and be in the Registry of this Court, in either case, the Court shall have full jurisdiction to take cognizance of all claims and causes of action of any person in respect of any mortgage of such ship or vessel, and to decide any suit instituted by any such person in respect of any such claims or causes of action respectively;" and (sect. 4) that "the Court of Admiralty shall have jurisdiction to decide all questions as to the title to or ownership of any ship or vessel, or the proceeds thereof, remaining in the Registry, arising in any cause of Possession, Salvage,

Where a vessel is arrested at the suit of mariners, for wages, but not the freight (which was not in the hands of the Court), the Court will not exercise its ordinary jurisdiction, or that given by the Stat. 3&4 Vict. c. 65, at the instance of a mortgagee, to adjudicate questions as to the ownership of the freight.

DEC. 20. *The Fortitude.* Damage, Wages, or Bottomry." The Act on Petition proceeded to allege that the jurisdiction thereby given to this Court, in respect to the claims of mortgagees, is confined to the ownership of any ship, or the proceeds thereof, and that no jurisdiction whatsoever is given to the Court to adjudicate upon the title or ownership of mortgagees to the freight, much less to permit mortgagees to commence a principal action in this Court against the freight, the action of the mariners being against the ship only, and that Douglas, as the only solvent owner, and master of the ship, is the only person legally entitled to receive the freight, and, after payment thereof of the liabilities thereon, to pay over to those entitled their proper proportions of the residue. On behalf of the mortgagees, it was alleged in the Act, that, as mortgagees of three-fourths of the ship, they claimed to be entitled to a certain proportion of the freight, in support of which claim this action had been entered; that, inasmuch as the ship was under arrest by process from this Court at the time when such action was entered, this Court has full jurisdiction to take cognizance of such claim, and to determine the suit, under the 3rd section of the Statute, wholly independent of the 4th section, with which the 3rd has not any, or at least not any necessary, connection.

Nov. 14.
ARGUMENT.

Addams, D. (desired by the Court to begin), for the mortgagees.—The vessel was under arrest, which fact founds the right of action. The only question is, as to the Court's jurisdiction. The 4th section of the Statute gives this Court jurisdiction to decide "all questions as to the title to or ownership of any ship or vessel, or the proceeds thereof remaining in the Registry, arising in any cause of Possession, Salvage, Damage, Wages, or Bottomry, which shall be instituted in this Court." This is a cause of action arising out of the mortgage. There is no connection between the 3rd and 4th sections: the latter does not limit the former.

Bayford, D., on the same side.—Formerly, in such a case as this, there were two questions: first, whether this Court could interfere in the case of a mortgagee; secondly, whether the Court was not obliged to hold its hand before it could decide a question of ownership. These two difficul-

are now met by the two sections of the Act ; one takes all difficulty about entertaining claims by a mortgagee ; her relates to other matters where the Court was for- stopped by Prohibition. In the "*Dowthorpe*,"* the crossed the mind of the Court, and the Court said :— ng that the Statute has relieved the Court from all the les which formerly existed as to the title to the ship mortgage, even if such obstacles did exist, which I some- doubt, I think that, incidentally, I necessarily have me power, in such a case as this, as to the freight ; therwise, I never could determine the amount of the 'ceeds of the ship itself." There is no doubt that all by mortgagees are now maintainable here when once essel is before the Court.

Dec. 20.

The Fortitude.

ggard, D., for Mr. Douglas, the owner of one-fourth of the vessel.—The question is, whether, under the 3 Vict. c. 65, this Court can exercise jurisdiction at the ce of a mortgagee of a ship, that ship being under for wages, and whether the mortgagee, not being in sion—who took no interest in the management of the , which was entirely in the hands of Mr. Douglas, the part-owner—has a right to bring the freight within isdiction of the Court, the freight not having been ed in the suit originally brought by the mariners for s. [PER CURIAM.—There are two questions ; first, er this Court has jurisdiction, at the instance of a agee, to call the freight into the Court to abide its mination of his claim ; secondly, whether, where a ves- s been arrested at the suit of a mariner for wages, the er having elected to arrest the ship, though he might arrested the freight also, a mortgagee is precluded from n upon the freight. Lord Stowell, in the "*Prince Re-*"† said, that where a party had a *lien* on three things, y not select one, and throw all the burthen upon that, g out all others, which are equally liable.] That was se of a bottomry-bond. The present question is put the plain language of the Statute, whether the Court

* 2 Notes of Ca. 264.

† Not rep.

DEC. 20. has power now to call upon a solvent owner,—[PER
The Fortitude. CURIAM.—Suppose the mariner had arrested the freight,—
the vessel and freight, or the freight simply?] If the freight
had been brought in, the jurisdiction of the Court would
have been well founded; but where the Statute gives the
Court jurisdiction as to the ship only, the question is, whe-
ther it does not exclude its jurisdiction in respect to other
matters. [PER CURIAM.—Can a mariner oust the jurisdic-
tion of the Court by arresting the vessel or the freight? Is
that your argument?] Prior to the Statute, we never heard
of a mortgagee suing the freight. The only question has
been as to proceeds in the Registry. [PER CURIAM.—The
great difficulty in my mind is this: one person may, by
arresting the ship instead of the freight, oust the jurisdiction
of the Court, and throw the burthen, which should be
borne by ship and freight equally, upon the ship alone. The
question is, whether a person can do so, and whether the
jurisdiction of the Court can depend upon the mere choice
of a party, who shall say, "I will exclude this or that," all
being equally liable in equity.] As respects the owners of
the freight, the parties would have a remedy in another
jurisdiction. If the Court thinks that, under the word
"ship," it can have jurisdiction over the freight, can the
Court stop there, and not include the cargo? The arrest
must fall to the ground, and the party be dismissed.

Curteis, D., on the same side.—The question turns upon
the Act only. The Court had no jurisdiction before the
Act, and can, therefore, exercise it so far only as the Act
has given jurisdiction to it. [Cited the "*Percy*,"* and the
"*Portsea*."†]

Addams, D., in reply.—The objection taken in the Protest
is abandoned; it is now contended that by the 3rd section of
the Act, standing by itself, the Court has not jurisdiction to
entertain the question. It is said that the word "ship" only
is mentioned, and therefore the jurisdiction of the Court over
the freight is excluded. But where the ship is mentioned,
the Court is given full jurisdiction over "all causes." This

* 3 Hagg. A. R. 402.

† 2 Hagg. A. R. 24.

is sufficiently wide to extend to the freight, and it is admitted that if the freight had been arrested, as well as the ship, the Court would have had jurisdiction to determine the question of ownership as to the freight. Then where is the objection to the Court's dealing with the claim?

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The Fortitude.

Bayford.—The case of *Smart v. Wolff** throws some light upon this question.

PER CURIAM.—I must take time to consider this question. *Cur. adv. vult.*

DR. LUSHINGTON.—This vessel was originally arrested Dec. 20. under the authority of this Court, at the instance of certain mariners, in suits for wages, and under such arrest it still continues. Things being in this state, a warrant was taken out at the instance of Messrs. Pease and Co., mortgagees of 48 sixty-fourth shares of the ship, and such warrant purported to arrest the ship and freight. The warrant was executed by arresting the cargo, and an appearance has been given for the master and part-owner (Douglas), and for the consignees. That appearance is under protest; bail being given in the same way. In the Protest, the jurisdiction of the Court is denied, and it states the following facts: that Humphrey the elder, in August, 1841, being owner of 48 sixty-fourth shares of the *Fortitude*, mortgaged them to Pease and Co.; that, in October, the vessel sailed to Australia and back to London; and that, during the voyage, Humphrey became bankrupt, and that Douglas, the master, was the only solvent owner. The Act on Petition then sets forth the third and fourth sections of the 3 and 4 Vict. c. 65, and alleges that the jurisdiction of the Court is confined to the proceeds of the ship; and that this is a principal action by the mortgagees of the ship for the freight, the ship only being arrested by the mariners; that the master is the only person to receive the freight, and pay it over to those entitled, after the discharge of the liabilities thereon. The answer, on the part of the mortgagees of the ship, is very short. It merely states that the mortgagees of the ship were entitled to a certain proportion of the freight, and refers to the

JUDGMENT.

* 3 T. R. 323.

DEC. 20. third section of the Statute, as conferring jurisdiction upon the Court under the circumstances.
The Fortitude.

The suit is substantially between Douglas, the master and part-owner to the extent of 16 shares of the ship, and the mortgagees of the remainder; for it does not, at least *prima facie*, appear that the consignees of the cargo have any real interest in the result. The question is one, in the present stage, simply of jurisdiction. If the Court has jurisdiction, it is bound to exercise it, whatever be the difficulty and complexity of the questions which might arise; if it has no jurisdiction, even a failure of justice consequent thereon would not give the Court a right of interference.

The question was argued principally with reference to the Act of Parliament, and two cases were cited at the Bar which I wish first to dispose of; the "*Dowthorpe*" and the "*Percy*." As to the former, it was most materially distinguished from this case, for, in the "*Dowthorpe*," there was a bottomry-bond, as well as actions for wages and pilotage; the ship and freight were arrested and under the control of the Court, in ordinary course, in the exercise of its ordinary jurisdiction, without reference to any Statute. The Court was, *ex necessitate rei*, bound to direct the payment of the balance of proceeds to the persons entitled, and to ascertain what that balance was. I greatly doubt if the ordinary jurisdiction of the Court was not sufficient in the case of the "*Dowthorpe*," without any reference to the Statute at all; but if the Statute was to be called in aid, it was merely for the purpose of deciding who were the owners of the freight and the burthens which that freight was subject to.

The "*Percy*." With respect to the "*Percy*," I retain my opinion, as to that case, expressed in my judgment in the case of the "*Dowthorpe*," and especially with reference to the decision in the "*Prince Regent*" by Lord Stowell. But, on further consideration of the case of the "*Percy*," I am strongly inclined to come to the conclusion that, in that decision, the real difficulties of the case were not brought under the consideration of the learned judge; it was a decision given at the very time when the question was argued. I will read it:—"The freight is part of the bondholder's security, but

he is not compellable here to enforce it." Now, so far, this does not militate against the decision of Lord Stowell in the "*Prince Regent*;" because Lord Stowell, in that case (as I observed in the "*Donthorpe*"), where the bond was on the ship and cargo, the freight not being mentioned in the bond, held that by law the freight was equally hypothecated, and that he was bound to make the freight responsible for the bottomry-bond before he could touch the cargo. Then Sir John Nicholl goes on:—"I am not aware that this Court has taken up questions of this kind as between mortgagees and owners." Why, it was not probable that, in former times, such questions would become matter of judicial discussion, as, fifty or sixty years ago, ships were not mortgaged as they now are, and it was not probable that, in such simple discussions as whether a bottomry-bond was valid, or the amount was due, questions of this kind would have arisen; but I am satisfied, if they had, the Court would have disposed of them. Sir John Nicholl continues:—"If it is bound to enter upon them, the mortgagee should get an Injunction to bar the payment of the existing proceeds to the bondholder; but unless the Court is so stopped, I adhere to the opinion that he is entitled to have his bond and interest paid out of the sale of the ship, and that a mortgagee has no right to impede the payment." Why, what sort of right is this? If an Injunction is obtained at all, it will tie up all the proceedings of the Court, and the Court will be unable to move at all. I think the question could not have been well considered. If the Admiralty Court had jurisdiction and refused to exercise it, then it might be compelled by *Mandamus*; if it had not jurisdiction, it might be stopped from attempting to exercise it by Prohibition. If it had jurisdiction, and if, under the peculiar circumstances of the case, it could not be exercised equitably, then undoubtedly an Injunction would lie from the Court of Chancery; but the very issue of an Injunction presumes that the Court had jurisdiction over the subject.

Respecting the other case—that of the "*Portsea*"—it is not necessary to say any thing: it was decided by Sir C. Robinson under different circumstances.

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The Fortitude.

The main distinction between the present case and that of the "*Donthorpe*" is, that here the freight has not been arrested in the ordinary course, by persons claiming a *lien* thereon, but it is an action brought by the mortgagees of certain shares of the ship against both the ship and freight. That they have a right to proceed against the ship or proceeds was not denied; the only question at present is as to the freight, arrested, as alleged, in virtue of the Statute.

The Statute.

With respect to the Statute, so far as relates to the present question, it had been doubted, or perhaps more than doubted, whether, where a ship had been arrested by process of this Court, it could take cognizance of the claims of mortgagees, or of any questions of title to the ship itself. For instance; whether they could appear to oppose claims against the ship; whether they could claim and receive a proportion of the proceeds. This state of things was detrimental to justice, and might have been the cause of much delay, as in some cases it was. So as to questions of title to the ship. The remedy was intended, as I conceive, to be commensurate with the evil, and the evil was that the Court could not exercise its ordinary jurisdiction to the full extent; it was not intended to confer new, separate, and distinct powers on this Court for the purpose: and that is the construction (if the words admit it) which I should be disposed to put upon the Statute.

Question depends on § 3.

Now, it appears to me that the question does depend upon the 3rd section of the Statute, and though it has been argued that the 3rd and 4th sections are to be taken together, my opinion does not agree with that argument. Now, two conflicting constructions have been put upon the 3rd section. The mortgagees taking out the warrant say, the vessel having been arrested, and this being a question arising out of the mortgage, the Court has thereby jurisdiction to take cognizance of "all claims and causes of action of any person in respect of any mortgage of a vessel, and to decide any suit instituted by any such person." The other construction, put by the parties resisting the warrant, is, that the jurisdiction is not as to any question arising out of the deed of mortgage, but as to the ship itself being mortgaged.

Now, I confess that my mind leans to the latter construction, as it assimilates more to the purposes for which the Act was passed—that is, it was a remedial Act, intended to restrain certain evils, and no further.

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The *Fortitude*.

The circumstances of the present case do not appear to me to bring it within the principle of the remedy, nor, as I conceive, within a fair construction of the words of the Statute: not within the principle, because the Court can exercise its ordinary functions with justice without resorting to the Statute: not within the words, because I think the more proper construction is, to restrain the enabling power to the ship alone. In this form of action, if maintainable, the Court might be called upon to adjudicate upon a right to freight, without reference to any other question, or to the nature of the suit. It is not a proceeding to make freight contributable *pari passu* to *liens*, whoever might be entitled to it; but to adjudicate upon the title to the freight itself. That was a question which was forced upon the Court in the case of the "*Donthorpe*," by the freight being in its hands, by virtue of its ancient ordinary process, for it had been arrested by the ordinary process. I am disposed, therefore, in this state of things, to pronounce in favour of the Protest. In the case of the "*Donthorpe*," I was induced to go the full length of the authority I had, and for this obvious reason, that I should have occasioned great inconvenience to the parties if I had not followed that course.

I wish it, however, to be most distinctly understood, that I do not intend in the least degree to affect the question of the right and power of the Court to call upon the holders of freight to bring it in, to bear its proportion of a *lien* imposed by law on the acts of a party, where such a proceeding is necessary for the purposes of justice, and arises out of cases where in the original cause the Court had clearly jurisdiction: such as the "*Prince Regent*" certainly was; such as the "*Donthorpe*" was in its main features, though not in every part of the case. In cases like the "*Prince Regent*," I may observe that the freight is brought in by virtue of a Monition, and not by instituting an original action, as in this case.

Case not
within principle
nor words
of Stat.

DEC. 20. It is, perhaps, almost unnecessary to add, that this decision does not forestall any question as to the payment of the proceeds of the ship, nor the question as to whether, out of the existing proceeds, the Court should not so deal with them as to make the 16 sixty-fourth shares of Captain Douglas liable to discharge the wages, not only *pari passu* with the 48 sixty-fourth shares, but also to bear, so far as wages are concerned, that share of the burden which the freight in equity ought to bear; nor do I say that a Monition to bring in the freight, so far as might be necessary, if the 16 sixty-fourths were sufficient, might not by possibility be granted. I leave all these questions, if they should arise, wholly untouched by my present judgment, and determine nothing but the point of law before me, under the peculiar circumstances which gave rise to it. I pronounce in favour of the Protest.

The Fortitude.

Protest pronounced for.

Costs.

Haggard asked for costs.

PER CURIAM.—If I were to follow my own judgment as to costs, I should consider that the proper principle is, that costs are not a penalty to be paid by one party, but a reimbursing of the other party. But I am aware that the whole course of the decisions on the subject of costs has gone on a different principle, not to give costs where the law is exceedingly difficult, and where the question is one *prima impressionis*; and therefore in this case I decline giving costs.

Proctors:—*Loveday*, for the mortgagees; *F. Clarkson*, for the part-owner.

END OF MICHAELMAS TERM, AND OF THE
SITTINGS AFTER TERM.

Admissions during the Term:—

AS PROCTORS.

NOV. 2.—HENRY ALLEN BATHURST, Esq.
AUGUSTUS PIGGOTT OLDERSHAW, Esq.
THOMAS FENTON, Esq.

SUPPLEMENT.

Consistory Court of London.

MARCH 16, 1842.

SNOW v. SNOW.—*Libel.**—This was a suit for separation, by reason of cruelty, brought by Mrs. Georgina Snow against Mr. Robert Snow, her husband. The admission of the Libel was opposed on behalf of the husband.

The Libel pleaded as follows :

Articles 1, 2, and 3, in the usual form, the courtship, the marriage of the parties on the 10th January, 1832, their cohabitation, and the birth of six children, two being still living. 4. That, in the same month of January, 1832, Mr. S., on his wife expressing a wish that her unmarried sister should pay them a visit, became exceedingly angry, and struck her on the head with his hand. 5. That, shortly after the marriage, Mrs. S. became pregnant, at which Mr. S. "frequently, in an unkind and ill-tempered manner, expressed his displeasure, and repeatedly told his wife that he considered children the curse of marriage;" that, in November, 1832, Mrs. S. being then far advanced in her pregnancy, Mr. S., "after using violent and angry language to his wife, threw a book at her, which hit her on the side. 6. That, in December, 1832, Mrs. S. gave birth to her first child, and a few days after, Mr. S. told her that he should go for some time into the country, whereupon she begged him not to leave her just then, "upon which he told her, in an angry and passionate manner, that he had not been married to her to be tied to her apron-strings," and accordingly he went into the country for several days. 7. That, in July, 1833, the parties went to Paris; that on their journey thither, Mrs. S. being again pregnant, Mr. S. "constantly treated her with unkindness and cruelty, repeatedly expressed his displeasure at her pregnancy and the annoyance it occasioned and the trouble of

A suit for divorce by the wife against the husband, by reason of cruelty. — The Libel opposed on the ground that it admitted condonation. — Whether condonation, as a plea in bar, can be noticed before it is pleaded. — Nature and effect of condonation on the part of husband and wife respectively. — Whether a wife can maintain a suit who has cohabited after the last act of adultery or cruelty. — Objection not sustained, and Libel admitted.

* This case was not reported, in its chronological place, in the first volume of these Notes, the decision being pronounced in a preliminary stage of the proceedings, upon the admission of the Libel only. The suit was ultimately abandoned, and, as the points decided are of importance, the report of the case is placed here.

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children, and on several occasions during the journey struck her with his fist on her head and sides." 8. That, in August, 1833, their child died, and in September, the parties quitted Paris for London; that Mrs. S. "suffered greatly from grief for the loss of her child, and Mr. S. added thereto by adverting to the event in unkind terms, saying, on more than one occasion, to his wife, 'How delightfully quiet the house is now! What a good ridance!'" 9. That, in March, 1834, the second child was born; that immediately preceding and subsequent to that event, Mr. S. "treated his wife with great unkindness, repeatedly telling her that he hated children, and using other expressions to the like purport;" that a few days after the birth of this child, he left his wife and went into the country for three weeks, telling her, on leaving her, "that he hoped he might find her and her baby 'laid out' on his return." 10. That, shortly after the birth of this child, and at other times, Mr. S. "told his wife, in an insulting and offensive manner, that he had only married her for the sake of getting introduced into her circle of society; that he cared not what admirers she had, provided they were titled and able to put money to his account; that he wished she would run off; that he would sell her for one thousand pounds, and would wink at her misdeeds; and frequently, during their cohabitation, he was in the habit of using the same expressions, or words of the very same import, and that he blamed her for not flirting and for not getting men to make love to her." 11. That, in the end of June, 1835, a third child was born, Mr. S. being absent, and upon his return, three or four days after, when he entered his wife's bed-room, she was sitting up in bed supported by pillows, engaged in writing a note, and "Mr. S., seeing a spot of ink on the sheet of her bed, flew into a passion and struck her on the head," and that such his conduct threw his wife into a state of fever. 12. That, about the end of July, 1835, Mr. S. threw an ivory paper-cutter at his wife's head, which struck her on the forehead, so that the blood flowed and she fainted; that the scar was still visible, but Mrs. S., unwilling to expose her husband, pretended that the wound was occasioned by her falling in a fainting-fit. 13. That, in August, Mr. S. kicked his wife out of bed; that she was much hurt and terrified, and ran into the room of one of her servants for protection. 14. That, about ten weeks after the birth of the third child, and whilst Mrs. S. was nursing it, Mr. S. struck her a violent blow on the breast, which produced a swelling of so bad a nature that a surgical operation was performed upon it; that Mrs. S., still unwilling to expose her husband, told the surgeon that it arose from her

having caught cold at church when her child was christened. 15. That, in July, 1836, whilst the parties were in bed together, "Mrs. S., being again pregnant, made some remark to the effect that the child with which she was pregnant was alive, whereupon Mr. S. struck her a violent blow with his fist on her belly, and at the same time held her down and stopped her mouth with the sheet, that the nurses, who were in an opposite room, might not hear her cry." 16. That, in September, 1836, whilst Mrs. S. was pregnant, Mr. S. got out of bed, and taking his wife's hair-brush, which was heavy, the back and handle being ivory, struck her a violent blow behind her right ear, which occasioned excruciating pain; that she has never entirely recovered from the injury, but in consequence of it still occasionally suffers dreadful pain and is frequently deaf. 17. That, in December, 1836, the fourth child was born; that prior to, and at the very time of, her labour, Mr. S. told his wife "he did not care what became of her, and hoped that her child would be born dead, or used other expressions to her of the like nature, whereby she was much alarmed and terrified." 18. That, in April, 1837, Mrs. S. being again pregnant, from dread of her husband, took every means of concealing it from him, but, soon suspecting it, he taxed her therewith, "and, being convinced of it, he abused and swore at her, and declared he would be the death of the baby; that his paroxysms of rage and violence of language towards his wife, in respect of her pregnancy, were such that he frequently swore at and kicked her so as to occasion marks and bruises on her person, and also to occasion her frequently to faint;" that by such his violent language and conduct, his wife's health became seriously affected; and that in August of that year she miscarried. 19. That, in March, 1839, Mrs. S. was again pregnant, and Mr. S., upon the discovery of and frequently during such pregnancy, abused, swore at, and ill-treated his wife, frequently sent coarse and insulting messages to her by her children, refused to allow her many comforts, then necessary for her, and often refused to let her have any tea in the drawing-room; "that, in consequence of such his language and conduct, Mrs. S. was brought into a state of great nervousness, and became subject to attacks of fainting and hysterics, her health was seriously affected, and a dangerous miscarriage ensued, which was occasioned (as Mr. S. had admitted) by his ill-treatment of, and by his violent conduct, and brutal and inhuman language, to his wife." 20. That, on an evening in June, 1839, as the parties were in their marriage, going to a party at the Duke of Devonshire's, in Piccadilly, the pole of another carriage broke through the back of

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theirs; "that Mrs. S., being greatly frightened thereat, screamed out, at which Mr. S. became very much enraged, and seized her fan, which he broke to pieces, and kicked her violently, and thereby occasioned her much pain and suffering." 21. That, in September, 1839, whilst the parties were travelling in North Wales, at an hotel at Bangor, Mr. S. proposed to his wife to extend their tour, when she expressed an anxiety to get home to her children (two of them being in delicate health), and Mr. S. "immediately flew into a passion, and after abusing his wife, tore off her cap, pulled her hair down, and, holding her by her hair with one hand, struck her several times on her head with his other hand and also with his fist." 22. That, in September, 1839, Mr. S. threw an ivory netting-box at his wife, which struck her nose, cut it severely, and occasioned her a black eye. 23. That, in the same month, he threw a chair at her, which struck her on her right side, and she immediately fainted and was carried to bed. 24. That, in April, 1840, while Mrs. S., who was far advanced in her pregnancy, was lying on her side on the sofa, Mr. S., "after making some upbraiding and unkind remarks about her then state, jumped upon her, and afterwards kicked and struck her with his fist on her hip and belly;" that Mrs. S. ran out of the room, crying violently, and shewed her nurse a swelling and bruises occasioned by the blows; that fomentations were applied, and Mrs. S. was attended by a surgeon and accoucheur, whom she told (being unwilling to expose her husband) that the injury was occasioned by her having fallen down; that her health continued to suffer greatly in consequence of the cruelty of her husband, and in reference to her approaching confinement great fears were entertained for her safety. 25. That, in February, 1841, Mr. S. struck his wife (whilst she was sitting down and nursing her infant) a violent blow on the left knee with the back of a bound book, which caused her knee to swell, so that it was necessary to call in a medical attendant, whom, in order to conceal the ill-usage of her husband, Mrs. S. told that the swelling was perhaps owing to some constitutional derangement. 26. That Mr. S. frequently, in the presence of his wife, and in spite of her remonstrances and entreaties, whipped his children with such severity, as to leave marks for a long time on their persons, and struck his boys with such violence as to knock them off their chairs, and placed and left them on the mantel-piece, to the terror of themselves and of his wife. 27. That, in May, 1841, the parties went to reside at Twickenham, taking with them their five children (three boys and two girls), three of whom (including the girls) were in delicate health

the youngest girl having had a determination of blood to the brain: that, on the 28th May, Mr. S., against the wishes and express request of Mrs. S., and notwithstanding her remonstrances, took the two female children in a boat on the river, and there took off their clothes, and dipped them into the water, and on the two following days, he again bathed the elder of the said children in the river, notwithstanding the remonstrances of Mrs. S.; that the child became seriously ill, and on the 2nd June, delirious; that Mrs. S. was in great grief and alarm, and ordered the carriage for the purpose of going to London for medical advice, but to which Mr. S. objected, and declared that his horses should not go, and that if she had post-horses she should pay for them herself, and that he hoped the child might die, and that they (meaning his two girls and one of his boys, then in delicate health) might all three be taken, and that then "the butcher's book would be less;" that he then struck his wife, and, leaving the room in a passion, slammed the door in her face. 28. That, on the 2nd June, 1841, Mrs. S. proceeded to London with her said eldest female child, who, within two hours of her arrival, died, and that by the language and treatment of her husband pleaded in the preceding articles, and by the shock occasioned by the death of the child, and also by the deaths of the younger girl and one of the boys (all within ten days), her health and spirits were materially affected. 29. That on the 6th June, the parties set off to the Continent; and whilst there, Mr. S. treated his wife with neglect, unkindness, and cruelty; that, on the 26th July, they arrived at Pesth, in Hungary, where they remained till the 1st August; that on the night of the 31st July, Mrs. S., being then three months advanced in her pregnancy, experienced violent pains in her right ear (as pleaded in the sixteenth article), of which she informed her husband, who said that her surgeon had told him that this was a symptom of pregnancy, and taxed her with being pregnant, put himself in a passion, and said, "By God, I'll be the death of you! I wish you were both dead!" that he then struck her several times on her arms with a leather strap, and also a blow upon her belly with the heel of his leathern slipper; that, in consequence of such ill-treatment, Mrs. S. miscarried next day on board the steamboat on the Danube. 30. That the blow which Mr. S. struck his wife was so violent, that she still suffers therefrom, and it produced an external injury. 31. That the parties left Constantinople on the 7th September, 1841, in company with J. E. V., Esq., and proceeded to Rome; that on their journey Mrs. S. was attacked by excruciating pain in her right ear (as pleaded in the sixteenth article), and notwithstanding Mr. S. was aware of

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and remarked upon the suffering and exhausted state of his wife, he did nothing to assist her, and against her entreaties, and the remonstrances of J. E. V., continued his journey in the night. 32. That the parties arrived at Paris, with J. E. V., on the 20th of November, and after dinner, at the request of Mr. S., J. E. V. left the room, when Mr. S. began to speak angrily to his wife in reference to some letters from England, held a knife to her throat, and threatened to kill her, of which she complained to J. E. V. on his return. 33. That, on the following morning, Mr. S., whilst dressing, began again to speak with anger, and to upbraid and abuse his wife, until, in a violent paroxysm of rage, he jumped upon the bed in which she was, and kneeling upon her, seized her violently by the throat and endeavoured to strangle her, declared he would murder her, that it would be soon done, at the same time pointing to his razors on a table close by him; that he also fell down on his knees, and "prayed to God to strike her dead," whereupon Mrs. S. ran out of the bed-room in her dressing-gown. 34. That she knocked at the door of J. E. V., and informed him of the conduct of her husband, who came into the passage which led to the ante-room of J. E. V.'s bed-room, in which ante-room Mrs. S. was standing, and called her; that she went into the passage, and J. E. V. followed; that Mr. S. asked her if she had told J. E. V. what had happened, to which she replied in the affirmative, and Mr. S. said to J. E. V., "What shall I do? I can never go on in this way." 35. That, after Mrs. S. had retired to her bed-room, J. E. V. said to Mr. S., "Can you be conscious of what you have been doing to your wife? She tells me that you had prayed to God to strike her dead; that you pointed to your razors, and said it would soon be done; that you seized her by the throat, and tried to throttle her;" that Mr. S. said, "Do you really think that I wanted to throttle her?" that J. E. V. replied, "Whether or not, it looks very like it; at all events, I think you wanted to frighten her to death;" that J. E. V., having observed that the throat of Mrs. S. was very red and inflamed, said, "At least, you seized her by the throat;" whereupon Mr. S. said, "No, at least;" that J. E. V. then said, "Where did you put your hands then?" Mr. S. replied, "On her shoulder, or perhaps one might have been on her neck;" that J. E. V. then said, "What did you put them there at all for?" that Mr. S. replied, "I only meant to shake her;" that J. E. V. then said, "Why did you threaten to kill her last night, and hold a knife over her?" that Mr. S. replied, that "he (J. E. V.) could not believe he was going to kill her; he was only acting;" that J. E. V. said, "I think it was acting enough."

re frightened any woman to death: if you did not try to kill her
 ectly, you did indirectly, and what has she done to deserve it?"
 t Mr. S. then alluded to the letters he had received from Eng-
 d, and said that it was "the information about his wife which they
 stained, that had put him into such a passion;" that J. E. V.
 ed him "if the letters caused him to suspect his wife's fidelity;"
 . S. caught him up, saying, "No, no; it's about tradesmen's
 s and presents;" that J. E. V. then said, "He was sure there
 st be something else that they had discovered in England; that
 was impossible he could make all that fuss about such a trifle;"
 t Mr. S. replied, "That it was nothing of the sort, but that her
 ily had a custom of making presents to their relations (of
 ich there were a great many) on Christmas-day, New Year's-
 , birthdays, &c.;" that J. E. V. then said, "Good God! is
 it the reason that your wife is to be treated in this way? it can
 but a matter of twenty pounds:" that Mr. S. replied, "It is
 ore than that;" that J. E. V. again said, "He never would be-
 ve that what Mr. S. had just stated was the real cause of his
 ger;" whereupon Mr. S. again replied, "That he had not the
 ghtest cause to reproach his wife for levity of character, or to
 abt her fidelity;" and added, "I knew her for two years before
 married her, and I watched her narrowly, and I never saw her
 t with any one either before or since her marriage; I have
 t thing to complain of but that kind of extravagance; it is her
 her's fault; it is all owing to that damnable education;" that
 . S. confessed that his wife was dreadfully alarmed at the attack
 had made upon her; that, on the night of that day, after the
 rties had retired to their bed-room, J. E. V. remained for the
 ction of Mrs. S. in the adjoining room till five o'clock the
 xt morning. 36. That, on the morning of the 22nd November,
 rs. S., with a view to legal advice, detailed to J. E. V. several of
 e instances of her husband's ill-treatment, which J. E. V. took
 wn in writing, and laid before Mr. L., an English solicitor re-
 ling in Paris, who gave his opinion in writing (exhibit No. 2,
 nexed), and in the evening of the same day, J. E. V., in the
 esence of Mrs. S., informed Mr. S. of his interview with Mr. L.,
 d that he had left with him a statement of facts, which Mrs. S.
 d furnished, and which he communicated to Mr. S.; "and, in
 ference thereto, conversed at great length with him on the cruelty
 his conduct; that such conversation made a great impression
 on Mr. S. (as he admitted), and he expressed deep regret for his
 -treatment of his wife, and promised that for the future he would
 ntrol his temper, and also pledged his solemn oath, or other-

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wise engaged most solemnly, to his wife, that he would not, during their stay in Paris, again ill-treat her; that Mrs. S., in consequence of such the declarations and promises of her husband, and being extremely desirous of avoiding remarks that might be made in the event of her resorting to a separate bed-room, did not then separate herself from her husband;" that it was agreed that Mr. S. and J. E. V. should proceed together to England, and that Mrs. S. should remain in Paris till her father or one of her brothers could escort her to England. 37. That, on the 24th November, J. E. V. shewed and read the paper referred to in the preceding article to Mr. S., and having asked Mr. S. if he would sign such paper, Mr. S. admitted the truth of the statement, but objected to several expressions in it; that J. E. V. thereupon began to write a new statement from the dictation of Mr. S., and after much discussion and consideration, the statement was finished, Mr. S. frequently, during the progress of it, objecting to expressions when he read them over, although the same had been written by J. E. V. in the precise words dictated by Mr. S.; that when the statement was ultimately completed, Mr. S. read it all through and signed it; that J. E. V. then signed his name to the paper, and Mr. S. took it to Mrs. S. (who was sitting in a different part of the room), and asked her to sign her name to it; that she was extremely agitated, and attempted to sign her name, but only made the first three letters of her Christian name, when she became faint, and was unable to complete her signature, and thereupon Mr. S., of his own accord, wrote the memorandum at the bottom of the statement, which he gave to J. E. V. 38. Exhibits the paper (No. 3) mentioned in the preceding article,* and pleads that the facts referred to therein are those pleaded in the 4th, 9th, 16th, 19th, 29th, 32nd, 33rd, and 34th articles, and mentioned in the exhibit No. 2. 39. That, on the 25th November, Mr. S. and J. E. V. quitted Paris together, and proceeded to England, leaving Mrs. S. at Paris; and on the day after their arrival in London, J. E. V., with the knowledge and approbation of Mr. S., took to R. K., the brother of Mrs. S., a letter from Mr. S., and the following day had an interview with her father and brother; that Mrs. S. and her brother left Paris together on 5th December, and arrived in London on the 8th, and that since

* This paper admitted several of the acts of violence alleged in the Libel, the use of "brutal and inhuman language" towards his wife, and her "irreproachable character," and expressed a readiness to "bind himself to do his best endeavour to reform his nature, so as to insure her future happiness and comfort, provided she will not proceed to extremities."

her arrival Mrs. S. had had no intercourse or communication with her husband. 40. Exhibits the letter* referred to in the preceding article. 41. That Mr. S. had possessed himself of all the books, papers, and letters of his wife, in consequence whereof she is unable to set forth with more exactness the dates of the transactions pleaded.

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Addams, D., and Deane, D., for the husband, in opposition March 11. to the Libel.—The fifth article lays a charge against Mr. Snow for which he might be made amenable to a criminal jurisdiction, and liable to be punished at common law; it cannot, therefore, be admitted into a Libel in this Court. The sixth article pleads matter of too trivial a character. The charges in the eighth and ninth articles consist of words only, and are put in merely to support the allegation, that the cruelty was inflicted for the purpose of preventing the wife having a family. The tenth article shews the *animus* of the suit: this is not a question of adultery on either side. The eighteenth again pleads an indictable offence, and this Court may be liable to prohibition if it proceeds in such a case, which is cognizable in the Criminal Courts. The nineteenth article again pleads trivial matter,—that the husband would not suffer his wife to have tea in the drawing-room. The twenty-seventh and twenty-eighth charge Mr. Snow with the murder of his child, and yet the wife continued cohabitation. But the matter pleaded in the thirty-sixth article is a bar to the suit, since it admits condonation after the last act of cruelty.

Sir John Dodson, Q. A., and Haggard, D., for the wife, in support of the Libel, stopped by the Court, and desired to confine their argument to the thirty-sixth article.—The Court will take all the circumstances of the case together; and, looking at the whole conduct of the wife, no entire condonation can be educed from it. The arrangement, which was a

* The letter is as follows: "My dear Roger,—The bearer, Mr. V., with whom, I believe, you are slightly acquainted, has been our travelling companion from Constantinople; he is in my confidence, and I trust in his honour. He will tell you things that will surprise and shock you relative to me and Georgina, which are all true. In the meantime, if Georgina is wanted, you or my brother Henry must fetch her from Paris. Mr. V. has had a long interview with me and my brother this morning. Yours ever, Robert Snow."

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temporary one, was necessary, and perhaps unavoidable, under the circumstances in which the parties were placed. The wife was in a situation of peculiar difficulty; there is no case on record in which the circumstances of the wife were so difficult as well as peculiar: a young woman, in a foreign country, with a young man for their companion, to whom she could resort only for a qualified protection. It was not a return to cohabitation, after separation: it was a continuance of cohabitation for three days for want of the opportunity to separate. She separated herself as soon as she could do so with propriety; she was *inops concilii*, and had not the means of getting away from her husband. In the whole of the Court's experience, it cannot recollect a case in which the alleged cruelty was so atrocious as in this. The violence and cruelty commenced within the month of marriage, and continued till within three days of the separation. There is no case in which a wife was held to be barred from her remedy by the qualified cohabitation we have pleaded, and some authority is necessary to justify the Court, especially in such a case as this, in precluding a wife from proving her Libel, on this ground. Can it be supposed that the wife, after what had occurred on the previous night, having placed herself to a certain extent under the protection of Mr. V., intended by such qualified cohabitation to condone all the acts with which Mr. Snow is charged? He made a solemn promise, that, "during their stay in Paris," he would not ill-treat her, upon which promise the temporary arrangement was based. [PER CURIAM.—Do you argue that a wife may return to cohabitation for a certain time, stipulating that it shall not operate as a condonation?] The Court will look at the circumstances of this lady, being in a foreign country, without relations, and without friends or advice.

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JUDGMENT.

Dr. LUSHINGTON.—The parties in this case were married in January, 1832, and lived together till the 25th of November, 1841, when Mr. Snow quitted Paris, where they had been residing, and came to England. The cessation of cohabitation is expressly pleaded at the end of the thirty-ninth article, and the period fixed for such cessation is the 8th of December, 1841, the day Mrs. Snow reached London. 1

think, however, the facts shew that cohabitation really ceased on the 25th of November. In this suit, Mrs. Snow prays the interposition of the Court, for the purpose of obtaining legal protection against acts of cruelty which she alleges have been committed against her by her husband. Now the truth or falsehood of all or any of the charges set forth in this Libel is not the subject of the present inquiry ; neither is it necessary to consider the various charges in detail ; for no doubt can be entertained that the personal ill-usage, stated in the Libel, is of the grossest character, affecting bodily safety, and even endangering life, and such as, if proved by evidence, and not barred by some legal impediment, would entitle Mrs. Snow, according to the law and practice of this Court, to the separation she prays.

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There is only one real question to be decided, and that is, whether the conduct of Mrs. Snow, taking it as described by herself in her own plea, does not form a legal bar to the progress of the suit ; in other words, whether that has not taken place, according to her own statement, which is technically called condonation.

Before proceeding to consider the meaning and effect of condonation, it may be well to notice a point which has been strongly adverted to in this case, and the subject of argument and controversy in others, namely, whether condonation, being in the nature of a plea in bar, should be noticed before it is expressly pleaded by way of defence ; whether it is fitting to consider it as a legal deduction from the premises pleaded by the wife, or whether the Court should not wait till the husband formally sets forth the fact in his defence against the charges.

Whether condonation in bar should be noticed before it is pleaded.

Now it is necessary to clear up this point, as there has been some confusion in former cases. When condonation is to be inferred from evidence only, without any facts being pleaded on either side which would raise the question, I take the result of all the cases to be, that unless such condonation was established by the clearest and most conclusive evidence, the Court would not be satisfied to act upon it ; for if it had been expressly pleaded, the other party might have produced further evidence to explain and disprove the

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defence. But I am of opinion that this reasoning does not apply to the case where the alleged condonation is to be inferred from the statements in the Libel alone. It cannot be injustice to the wife, for it is her own *ex-parte* statement alone which is to be considered. It is not likely to induce error, because, if the facts are not amply sufficient to lead to a legal conclusion against the admissibility of the plea, the principle universally recognized is, to allow the suit to proceed; whereas, to decline taking cognizance of the whole legal effect of the facts pleaded, in this stage of the case, might, in some cases, lead to long delay, useless and expensive litigation, and a grievous disappointment of hopes not unreasonably entertained by the wife, in consequence of the admission of her plea. And I am not without authority for the course I now adopt; for, looking to the case of *Popkin v. Popkin**, I find that Lord Stowell proceeded on the same principle which I am now about to adopt in the consideration of this case. In that case, a Libel was offered in a suit for the adultery and cruelty of the husband; it was objected to *in toto*, and Lord Stowell said, "I can reject it *in toto* only on two grounds: first, that the story, on the face of it, shews a false case, which cannot be proved; secondly, that it evidently appears from the facts pleaded, that the party complaining has barred herself:" so that he felt bound to take all the facts into his consideration; and if, on a due consideration of the facts, he thought the Libel shewed sufficient to bar the wife, he was bound to pronounce a judgment upon it.

The Court may pronounce whether the circumstances pleaded in the Libel amount to legal bar.

For all these reasons, I feel myself bound, in discharging my duty, and in justice to the parties, to pronounce my opinion whether the circumstances pleaded in the Libel amount to legal condonation, and form a bar to the admission of this Libel.

Condonation, though a technical term, clearly imports the forgiveness of an offence done, and is stated by Sanchez,† and in some decisions in these Courts,‡ to be of two kinds—

* 1 Hagg. E. R. Supp. 766.

† *De Matrim.* l. 10, disp. 5, No. 19.

‡ *Orme v. Orme*, 2 Add. 382. *Dunn v. Dunn*, 3 Phill. 9.

the one, *remissio expressa*, by express words of forgiveness and succeeding reconciliation; the other, *remissio tacita*; and the *remissio tacita* includes a return to connubial intercourse. 1842.
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After a careful consideration of all the previous cases which have any bearing upon the present, I am compelled to say that there are many points still left in obscurity, doubtless because preceding judges did not find it necessary for the decision of the cases before them to pronounce any opinion as to such difficulties. The course I propose to take is, first, to endeavour to ascertain what has been decided, and then, if possible, to determine this case by the application of the same principles to its circumstances. Many points
obscure.

First, I apprehend, as the result of the cases, it has been determined that a return by the husband or wife to the marriage-bed is, in almost all ordinary cases, a *presumptio juris et de jure* of connubial intercourse; secondly, that a return to connubial intercourse is *prima facie* a condonation of past adultery and previous cruelty, liable to be rebutted, however, in many cases: as, in the first instance, where the return to connubial intercourse was compulsory, no such inference could be drawn; in the second instance, there would be no condonation in a case of adultery where the whole of the adultery committed is not known to the party aggrieved; thirdly, it is universally laid down by all the great authorities, that a great distinction respecting condonation exists between a husband's adultery and a wife's adultery, and that much would be considered culpable in a husband which is praiseworthy in a wife; and, fourthly, it is equally admitted that, when once condonation has actually taken place, the right to complain of previous cruelty or adultery is gone, unless revived by the commission of the like offences, or something approaching to or savouring of them. I use expressions which, it is well known, are employed by Sir John Nicholl in *Durant v. Durant*,* when I say that cruelty may be revived by a less degree of cruelty than is necessary to found a suit for divorce in the first instance, Result of de-
cisions.

* 1 Hagg. E. R. Supp. 733.

1842. and also that adultery may be revived in a case of attempt-
 MARCH 16. ing to have adulterous intercourse with other persons.

Snow v. Snow. Now, in the present case, there being no suggestion of any revival of the cruelty after the return to the marriage-bed, the sole question is, whether that return to the marriage-bed, under the circumstances pleaded, constituted condonation in its legal sense, and consequently the difficulty which arises in the present case is, the application of that which I have called the third rule in the preceding observations; for had this been the case of a husband returning to the bed of an adulterous wife, I should without hesitation have said that the condonation was legally complete. The case of *Timmings v. Timmings*,* though totally different in many respects, is also a strong authority for this position. But the pinch of the case, and that which I do not find has been decided anywhere, is this: whether, where the husband had committed adultery or cruelty, and the wife continues cohabitation, which is often held to be laudable, she can quit her husband and maintain her suit, where the cohabitation was continued after the last act of adultery or the last act of cruelty. Of course, I exclude from my consideration cases of continued cohabitation by force or fraud, which I will speak of hereafter.

Whether,
 where a husband
 had been guilty of
 adultery or
 cruelty, a wife
 can maintain a
 suit where
 cohabitation
 was continued
 after the last
 act.

In case of First, take adultery, which may be distinguishable from
 adultery. cruelty; if a wife, cohabiting voluntarily with her husband after the last act of adultery, may bring her suit, notwithstanding that cohabitation, many difficulties would arise: for how long a time does that right continue to exist? for a week, or a month, or a year, or for no fixed time at all? Is it to be left to circumstances whether cohabitation was condonation or not? And if this could be left in so loose and unsatisfactory a state, what becomes of the whole doctrine of revival of past offences? If cohabitation be not presumed condonation, there can be but little room for the doctrine of revival, and many of the previous decisions would appear to have been altogether vain. The truth is, and much of the obscurity arises from the fact, that, in the

* 3 Hagg. E. R. 76.

rious discussions on this subject, the line of distinction between condonation and other conduct which would equally be a remedy has not, and I might perhaps say could not, be perfectly observed. Thus it is that condonation has been mixed up with that which, though it works the same effect, is totally dissimilar in its nature. Both husband and wife may so repeatedly forgive adultery, that the remedy is forfeited, the party shewing an insensibility to the injury. Most of the observations in favour of the wife's repeated forgiveness only go to this, that her endurance shall not be construed to be insensibility to injury. It is not necessary that I should follow out more minutely the reasoning with respect to cohabitation after adultery amounting to condonation, and a bar against the party condoning obtaining a decree of separation; it is not necessary to do so for several reasons: there is no adultery in this case, and though in decisions of condonation I have almost uniformly found the same doctrine attempted to be applied to condonation both of adultery and cruelty, still I think the two offences are so distinct in their nature, that the same considerations cannot be equally applicable to both; and there being no necessity for it in this case, it would be stepping out of my proper bounds if I were to give any opinion as to the condonation of adultery by cohabitation, nor would I have discussed it at all had it not been indispensable to the due consideration of the present case, in consequence of the distinction between adultery and cruelty not being kept clear in former cases.

With respect to condonation of cruelty by cohabitation, there is no doubt that where such cohabitation is the effect of force or fraud, it never could amount to legal condonation: this is too manifest to require discussion. Then, the presumption of cohabitation working condonation be rebutted by other circumstances—and if so, by what?

I have been most anxious to find some authority on this point, and I believe that none can be found directly bearing the point. In the case of *Westmeath v. Westmeath*,* the

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In case of
cruelty.

* 2 Hagg. E. R. Supp. 1.

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—
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condonation by renewed cohabitation was admitted on all hands to be perfect and complete, and the only real question was, whether the antecedent cruelty was revived by cruelty subsequent to the reconciliation. That case commenced in the Consistory Court of London; Sir C. Robinson was of opinion that the wife's case was not proved, but Sir John Nicholl was of a different opinion. The only sentence in the very able judgment of Sir John Nicholl which affords any light to this subject is the following: "Cruelty in almost every instance must consist of successive acts of ill-treatment; at least, if not of personal injury; so that something of a condonation of earlier ill-treatment must in all such cases necessarily take place." The case of *D'Aguilar v. D'Aguilar* has rather a closer bearing on the present case with respect to this point. The doctrine which Lord Stowell there laid down is, that patient endurance of cruel treatment is not only not a bar to a wife's suit, but raises no presumption against the truth of her complaint. That case illustrates the difficulty of this. There was, as Lord Stowell terms it, an "extorted consent" to return to cohabitation, so far as to dwell with the husband in the same house; but, as Lord Stowell expressly stated, "there was no return to conjugal cohabitation;" and therefore it was not, in the usual sense of the term, a complete forgiveness. Yet Lord Stowell thought it absolutely necessary to shew that the cruelty committed prior to the return to cohabitation was revived by cruelty subsequently committed. It would appear, therefore, that Lord Stowell was *primâ facie* of opinion that the return to the husband's house, though unattended with conjugal intercourse, would not operate to condonation; but he gave no direct opinion whether it would or not. The way in which he expresses himself is this: "If this acquiescence is a condonation, still it is only conditional:" and he speaks of the circumstances necessary to be proved in order to have the effect of condonation; but the circumstances are peculiar to that case.

Now *Popkin v. Popkin*, though not affording any clear

* 1 Hagg. E. R. 781.

, and differing in many essential particulars, is yet more
 ortant, for the mere continuance to cohabit for a short
 after the last act of cruelty was not deemed fatal to the
 's suit. Lord Stowell expressed himself in that case
 : "The acts of violence are not objected to; but it is said
 consented to live with him. It is not, however, neces-
 for a wife to withdraw from cohabitation on the first or
 nd instance of misconduct; it is legal and meritorious
 er to submit to no inconsiderable degree of ill-treatment;
 e patient as long as possible. Such forbearance is not
 mitted to weaken her title to relief. But here the cruelty
 arried down to the latest period of the cohabitation."
 refers to the attempts of the husband to draw the wife
 is bed when he was infected with the venereal disease,
 he expresses himself in conclusion thus: "I am clearly
 opinion that, as this disease continued till December, she
 ting cohabitation on the 6th January, it brings the charge
 n sufficiently; revives former acts of cruelty, and repels
 suggestion of condonation." So that he did not consi-
 that the wife's remaining in connubial intercourse with
 husband for the short period from the end of Decem-
 to the 6th January deprived her of remedy. I am
 e that the circumstances of that case were extraor-
 ry and peculiar; but I am endeavouring to extract
 doctrine upon this point from the observations of Lord
 ell.

mbining, as far as I am able, all these considerations,
 ak I am justified in saying, that connubial cohabitation
 the last act of cruelty is not necessarily and universally
 , as condonation, to a wife's suit, even though such
 bitation may be in one sense a voluntary cohabitation,
 ay not be forced or fraudulently brought about by
 husband. There are many circumstances in which it
 d be exceedingly difficult, if not impossible, for the
 to withdraw from cohabitation, especially when abroad;
 if such continued cohabitation were wholly unaccom-
 ed with any intention to condone, and attended by a
 mination to separate on the first safe opportunity, I
 t the Court could not hold the wife to be entirely de-

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 after the last
 act of cruelty
 not universally
 a bar to a wife's
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prived of all remedy in cases of great cruelty, where there was no reason to believe (to use Lord Stowell's expression*) that the husband was *emendatus moribus*. The Court must consider the safety of the wife ; a continuance to share the husband's bed may not, under certain circumstances, in the least degree prove that she was not afraid of renewed violence, or that the husband repented his past cruelty and intended to treat her with conjugal kindness.

I am, therefore, under the necessity of saying, that the general principle of condonation, arising from connubial intercourse, though not absolutely forced or fraudulent, and of such condonation operating as a bar, does not in all cases of cruelty universally apply to a wife, and that whether such connubial intercourse shall operate as a bar must depend on all the circumstances of each individual case.

I am well aware of the danger of abandoning a general rule, and it is that danger which induced me to consider this case with a most careful attention ;—I say I am well aware of the danger of abandoning a general rule, and how impossible it is to define all the cases of exception, and how many will imagine that the circumstances of their own case may work an exception, when upon no principle can they be so considered. I am well aware how much doubt and uncertainty may arise from such a relaxation ; but I am conscientiously convinced that the peculiar nature of the bond which unites husband and wife, the extraordinary cases which may occur of continued connubial intercourse under circumstances which no one can foresee ; the power of the husband in cases of cruelty over the wife, and many times the helplessness of her condition—all these considerations compel me to say, that the risk attending the relaxation of the principle would be less than the mischiefs resulting from its rigorous enforcement. Without pretending to define the circumstances which would form cases of exception, but being satisfied that the protection and safety of the wife require the relaxation, I now proceed to consider the facts of the present case.

* In *D'Aguilar v. D'Aguilar*, 781.

1. The cruelty charged commences about the period of marriage, and if the charges be true, in violence and brutality they are scarcely to be surpassed, and such acts of gross personal ill-treatment are continued down to the 21st November inclusive. 2. The wife's return to cohabitation, or rather the not breaking it off, takes place on the 22nd November, after legal advice had been resorted to; after Mr. V., who resided with the parties, was informed of the facts; after Mr. Snow had solemnly promised to abstain from further personal violence, and with a view, as alleged, of avoiding public scandal. 3. This cohabitation lasted but three days, and during that time there is a written confession of certain acts charged against Mr. Snow, which was signed by him. Mr. Snow and Mr. V. leave Paris on the 25th November; the cohabitation then ceases, and Mrs. Snow is brought home by her brother, who was not an improper guardian in such a case. Proceedings are commenced in this Court at the earliest possible period, on the 18th December following. Under these circumstances, it does appear to me that Mrs. Snow could not intend, by returning to her husband's bed, to forgive his past cruelty; that it does not import a conviction that he would permanently reform his conduct, and treat her with kindness; and that, considering the shortness of the cohabitation, the nature of the charges, the fact of her being abroad, and the speedy commencement of the suit here, I ought not, by rejecting the Libel, to hold her deprived of all remedy; but more especially on this ground, that I have not sufficient reason to be judicially satisfied that, if compelled to return to her husband, there would not be a renewal of the alleged outrages.

Now, with respect to the particular articles of the Libel, one of the objections raised was a general objection—namely, that some of the charges were cognizable at common law, and therefore cannot be preferred in a suit of this description. But I entertain considerable doubt how far that objection, even if founded in fact, with reference to the contents of the articles, ought to prevail. I take the rule to be this: according to some cases, in a proceeding against a clergyman, a criminal charge cannot be preferred

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of the present
case.General ob-
jection to the
Libel;

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not sustained.

in these Courts, if it is cognizable at common law ; but in a case of cruelty, such charges may be pleaded incidentally. I am not aware that it has ever been held that, because a husband is punishable at common law, a wife is therefore prohibited from suing her husband : take the cases of bigamy, assaults on a wife, or on a child in her presence. So that, when the charge is made incidentally, I consider it admissible for the purpose of ultimate decision when the Court has the evidence before it. But it is not necessary to follow this up, because I do not find that there is any charge preferred at all with a view to accuse Mr. Snow criminally as to any part of his conduct. Looking at this objection as a general objection, I do not think it should prevail.

(The Court then proceeded through the articles, rejecting the 6th, 8th, and 10th, and directing the reformation of the 17th, the 19th (by expunging that part relating to Mr. Snow's refusal to let his wife have tea in the drawing-room), the 27th (expunging all the passage relating to his dipping the children in the river), the 28th, the 37th, and the 38th. In regard to the 36th, the Court expressed its opinion as follows :)

The 36th article has given rise to the judgment which I have pronounced on the merits of the case ; it was objected to on general principles, and not as to the words ; and here I will take the opportunity of observing that, in the opinion
Libel admitted. I have delivered as to the admissibility of this Libel, I did, as suggested by the learned Counsel, feel myself bound to take into my consideration the admission made by Mr. Snow, that " he expressed his deep regret for his ill-treatment of his wife, and promised that, for the future, he would control his temper, and also pledged his solemn oath, or otherwise engaged most solemnly to Georgina Snow, that he would not, during their stay in Paris, again ill-treat her." It appears to me that the observation of the learned Counsel is well worthy of consideration, because it makes a distinction between this case and a case of ordinary continued cohabitation.

Proctors :—*Nicholson*, for the wife ; *Wheeler*, for the husband.

Judicial Committee of the Privy Council.

JULY 10th, 1843.

PANTON v. WILLIAMS.—*Appeal.*—Cause.—This was an appeal from a decree of the Judge of the Prerogative Court of Canterbury (28th July, 1840), whereby he pronounced * for the validity of an alleged will and two codicils of Jones Panton, Esq., of Plasgwyn, in the county of Anglesea, and of Derwen Hall, in the county of Denbigh, who died 26th May, 1837, aged 75, a widower, leaving two sons, two daughters, and four grandchildren. The sons (surviving) were Mr. Paul Griffith Panton, and Mr. William Barton Panton, (the Appellant); the daughters were, Mrs. Martha Hamilton, wife of the Rev. W. P. Hamilton, and Mrs. Lauretta Maria Williams, wife of Mr. Thomas Williams (the Respondent). The testator died possessed of personal estate amounting to upwards of £50,000, besides real property situated in four counties of North Wales, at Portsmouth, and in London; the principal part of the real estate had been settled on the issue of his eldest son, Mr. Jones Panton (deceased in 1830, leaving three children), the testator reserving a power of appointment on failure of such issue. The papers in question, namely, the will, dated 6th November, 1834, and the two codicils, dated respectively 15th October, 1836, and 7th May, 1837, were propounded by Mr. T. Williams, of Brynbras Castle, Carnarvon, the sole executor named therein, and opposed by Mr. William Barton Panton, of Garreglwyd, sole executor named in a codicil of 21st April, 1831, to a will dated 5th November, 1828.

The papers which the testator left behind him (besides those in question) were the following:—a draft will, executed 26th January, 1824, by which, referring to the settlement made on the marriage of his eldest son, Mr. Jones Panton (deceased), and making heir-looms of certain pro-

A will and two codicils, bearing the genuine signature of the testator, but accompanied by very suspicious circumstances upon the face of, as well as *dehors*, the papers, pronounced for in the Court below on the strength of the testimony of the attesting witnesses,—the testator's capacity being unimpeached:—the sentence reversed on appeal, the superior Court admitting further evidence not admissible in the Court below.

Testamentary papers.

* The sentence is reported in 2 Curt. 530.

settlement, on failure of issue of his eldest son, in favour of Mr. P. G. Panton, in default of issue, in favour of his other children, one after another, and he devises other estates equally between them, and bequeaths all his personal estate to Mr. P. G. Panton and Mrs. Williams, as executors. A codicil, dated 10th Nov. 1825, by which he devises a certain estate in the parish of Denbigh to Mr. P. G. Panton, absolutely, and Anglesea and Denbigh to his five other children, and declares such estates not to be comprised in the settlement of his eldest son; and in all respects confirms his will. A will, dated 5th Nov. 1825, in which the testator, after reciting the marriage settlement, exercises the power of appointment reserved in the settled estates, first, in favour of Mr. P. G. Panton, in default of issue, in favour of Mr. P. G. Panton, Mrs. Williams, and their issue, successively, and then devises other estates to Mr. W. B. Panton, Mrs. H. Williams, as tenants in common, and the residue of the codicil of 1825 to Mr. P. G. Panton, to him and Mrs. Williams, absolutely, and the estates given by that will to his younger children are devised, with all other real estate in England, Wales, or elsewhere, to Mr. W. B. Panton, and Mrs. Williams, as tenants in common, and he bequeaths to them all his personal estate, and appoints them executors. A co

and in all other respects confirms his will. A codicil, April, 1831, by which, after reciting the devises and made by his will of 1828 to Mr. W. B. Panton, Mrs. and Mrs. Williams, and the bequest of the articles lest son by the codicil of 1829, and the death of he revokes those devises and bequests altogether, es all his estates real and personal to Mr. W. B. solutely, giving Mrs. Hamilton a legacy of £10, Williams a legacy of £400; he also revokes the ent of these two daughters as executrices, and con- Mr. W. B. Panton sole executor; and in all other he confirms the will. A codicil, dated 29th May, ereby he revokes the bequest to Mrs. Williams of l bequeaths to her £200 for her separate use; con- will and codicils, save as thereby altered, and de- bequeaths all his real and personal and all other of every kind and description to his son and exe- W. B. Panton.

ll of 6th November, 1834 (propounded in the Papers pro-
vise all the testator's estates in Anglesea to Mr. pounde.
ton, his eldest surviving son, and his heirs; his
Denbigh and Merioneth to Mr. W. B. Panton ab-
the rents and profits of his estates in Flint to Mrs.

Mrs. Williams, and the children of a deceased
as tenants in common, and devises and bequeaths
due of his estate, real and personal, to Mrs. Wil-
lutely, appointing Mr. T. Williams sole executor.
il of 15th October, 1836 (also propounded), rati-
onfirms the will of 1834 by date, and ratifies and
he bequest of all the personal property to Mrs.
absolutely, and confirms the appointment of Mr.
as executor. The codicil of 7th May, 1837 (also
ed), referring to the will of 1834 by date, and
; the same, gives a legacy of £20 to Jane Thomas,
r's upper housemaid.

apers, propounded by Mr. Williams, were opposed Ground of
m. Barton Panton on the ground that they were opposition.

the appearances upon them raising, it was con-
inference (in addition to facts and presumptions

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adverse to the dispositions contained in them) that the real signature of the deceased had been obtained to them when they contained other matters written in pencil, which pencil-writing had been rubbed out, and a testamentary disposition (in the handwriting of Mr. Williams) substituted. The remains of the pencil-marks indicated that the paper had been used for plans or maps of certain houses in London possessed by the testator jointly with a Mr. B. B. Hurlock, as tenants in common, for the partition of which negotiations had been going on between the testator and Mr. Hurlock from 1832 to 1834, Mr. Thos. Williams being the testator's agent in such negotiations. On the side of the Respondent, the case set up was, that the pencil-marks had been fraudulently placed upon the papers, since they had left his custody, for the purpose of raising a false inference of fraud against him. The discovery of these pencil-marks upon the documents was made in the first instance by Mr. Richard William Jennings, an Examiner of the Court, during the execution of the Commission for the examination of witnesses in Wales, and in consequence of this discovery, the proceedings in the cause were interrupted by the apprehension of Mr. Williams (whose papers were seized), Ellen Evans, and Ann Williams, the two surviving attesting witnesses to the will propounded, on a charge of forging the will and codicils, on which charge they were tried at the Central Criminal Court, at the Old Bailey, on the 14th April, 1838, and acquitted.

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In the proceedings in the Court of Appeal, a deed was allowed to be brought in, which had been discovered by the Appellant whilst the cause was under argument in the Court below, * but which the Judge refused to admit in that stage. This document, which bore date 31st May, 1834, was admitted to be a genuine agreement between Mr. B. B. Hurlock, on the one part, and the testator on the other, for the partition of certain houses in London, executed by the parties in the presence of Mr. T. Williams, and Ellen Evans

* The argument in the Court below lasted (with intermissions) from the 12th December, 1839, till the 28th February, 1840.

and Ann Williams, his servants, who attested the same, and who, in their depositions, had stated that the testator did not execute any other instrument besides his will, in their presence, in May 1834. The will here referred to, bearing date 31st May, 1834, was pleaded by Mr. Williams to have been destroyed when the will of November, 1834, was executed; but a scrap of paper was produced, as part of this will, upon which was the attestation clause, with the names of Ellen Evans, Ann Williams, and John Williams, subscribed thereto. The two surviving witnesses deposed that, when the deceased executed the will, he said, "I deliver this as my last will and testament."

The affidavits of Mr. French, the proctor of Mr. W. B. Panton, the Appellant, of Mr. Panton himself, and of Mr. Heales, of Doctors' Commons, proctor, employed by the Appellant to assist in the superintendence and management of the proceedings in the cause, set forth the circumstances under which the deed and articles of agreement had been discovered, and the date of the discovery. It thence appeared that Messrs. Heales and French, on the 22nd February, 1840, during the argument of Counsel at the hearing of the cause in the Prerogative Court, inspected certain indentures of lease and release for effecting the partition of the premises held by the testator and Mr. Hurlock as tenants in common, which were produced in the cause by Mr. Williams (the Respondent), and Mr. Heales, having then observed a memorandum relating to the surrender by the wife of Mr. Hurlock of her title to dower in the premises, endorsed on the indenture before Mr. Baker, of Chipping Ongar, attorney-at-law, as one of the Commissioners, whose name was subscribed thereto; knowing Mr. Baker, and wishing to see the signatures of the witnesses who might have attested other indentures for the partition of the premises, which are in the possession of Mr. Hurlock, he (Mr. Heales), on the 24th February, went to Chipping Ongar and saw Mr. Hurlock, who produced the indentures, and upon his (Mr. Heales') inquiring of Mr. Hurlock if he knew whether the articles of agreement executed by him and the testator in May, 1834,

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the deed of 31st
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were still in existence, Mr. Hurlock said they were, and in his possession, and immediately produced them.

In his sentence, the Judge of the Court below characterized the case as one which came before him under very extraordinary circumstances, and as of a more complicated nature than ever had occupied the attention of that Court. He observed that the circumstances attending the execution of the papers must necessarily excite considerable jealousy and caution in the mind of the Court, and require it to examine the evidence with great care; but that, on the other hand, proof might be adduced adequate to discharge the burthen that lay upon the executor who propounded the papers, which might account for the disposition, by former testamentary acts; by a change in the testator's feelings and affections towards the different members of his family; by shewing that he was of a fickle and changeable disposition; by proving declarations of prior intention, and subsequent recognition; that intrinsic evidence might be adduced from the contents of the papers themselves, demonstrating that they could only have proceeded from the testator himself, and the act might be supported by the irresistible testimony of witnesses on whose credit and veracity there was no imputation. In reference to the state of the testator's affections towards his family, the Judge noticed a quarrel between the testator and Mr. P. G. Panton, in 1828; the displeasure of the testator towards Mrs. Williams, his daughter, who, on her marriage with Mr. T. Williams, in 1829, had an action brought against her for breach of promise of marriage, which the testator compromised by paying a sum of money; the dispute between Mr. Barton Panton and Mr. T. Williams, in the course of which a blow had been given by the latter to the former; and the action brought by the testator against the husband of Mrs. Bulkeley Williams, another of his daughters, for the recovery of a valuable ring. These were circumstances which might have influenced his testamentary dispositions. Mr. Barton Panton was the testator's youngest son; he had never left his father's house; he had the management of his father's pro-

perty, and always was his favourite son. The medical attendant of the family spoke to the attention, affection, and kindness, shewn by Mr. Barton Panton to his father, and to the testator's affection towards him extending to his son's wife and only child. It was, therefore, difficult to account for the testator's departure from his intentions in their favour shewn in the will of 1828, confirmed by the codicils of 1831 and 1833. The Judge then adverted to the fact that, though the testator died on the 26th May, 1837, and the will (in favour of Mr. W. Barton Panton) was, on the 9th June, read to the family, in the presence of a person who attended on behalf of Mr. Thomas Williams, and the Rev. Owen Gethin Williams (brother of Mr. T. Williams) made extracts from the will; and though Mr. W. B. Panton had assumed the duties of executor; no intimation was given by Mr. Thomas Williams that he was in possession of a will of later date: it was not till the 18th or 19th of July, after probate of the will had been stopped by Mr. Williams, that the advisers of Mr. B. Panton knew the contents of these papers. With respect to the questions in issue, whether Mr. T. Williams was at Plasgwyn on the 7th May, 1837, when the codicil bore date, and whether John Williams, the deceased attesting witness to the will, could write, the Judge considered the latter point doubtful, and, in regard to the former, that it was more probable that he was at Plasgwyn than that he was not. He concluded a long and minute examination of the evidence in the following words:—

“It does appear to me that this is a case in which there is a mystery the Court cannot penetrate. If the witnesses on the *conduit* had varied in any material degree, the Court would have had great difficulty in coming to the conclusion that this was the act of the testator; but when I see these witnesses consistent from the beginning to the end,—from the first moment when they were examined on the *conduit*,—when they were examined extrajudicially by Mr. Tyrer, afterwards judicially in a court of law, and subsequently in two examinations in this court,—when I find them con-

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sistent throughout, and adhering to the story they originally told, I cannot feel myself at liberty to say that I entirely disbelieve them; and if I cannot disbelieve them, then it is proved that the deceased did execute this as his last will and testament, and with the opportunity of knowing the contents of the papers: and, being so, the Court can pronounce no other sentence than in favour of their validity. Accordingly, the Court does pronounce for them, though not without great doubt, great difficulty, and great misgiving in its own mind with respect to the real state of the facts."

The case was argued before their Lordships for several days, *Thesiger*, Q. C., and *Addams*, D., for the Respondent; *F. Kelly*, Q. C., and *Phillimore*, D., for the Appellant.

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LORD BROUGHAM.—This case now comes on for the judgment of the Court, after having been presented to us very fully by as able and as laborious an argument upon both sides as could well have been desired, in order to assist the determination of a question considerable in point of magnitude, and encumbered with extraordinary difficulty. This difficulty, arising from the singular peculiarity of the facts, had been much felt also by the Court below, and it is not among the least remarkable of these peculiarities, that we should be now called upon to affirm a judgment pronounced, by the avowal of the very learned judge who gave it, to have

Difficulty of
the case.

been formed in "circumstances which had created the greatest difficulty in his mind, and left him in the greatest uncertainty, the case being covered with a mystery not to be penetrated." That learned judge gave his sentence for the testamentary papers propounded by the Respondent; but "with great doubts," as he declared, "with great difficulty, with great misgiving in his own mind touching the real state of the facts." It is needless to add, that from hence has arisen no ordinary measure of anxiety on the part of their Lordships: but, in proportion to that anxiety has been the care and attention which they have bestowed upon the case, and they have certainly been able to arrive at the conclusion to which they are now come, with as full a reliance upon the grounds of it, and as full a confidence in its sound-

ess, as could in such circumstances have reasonably been expected.

It is of itself not immaterial to consider that the contention of those who are setting up these papers is encumbered with so much difficulty; for, whether the question arises between a will and an alleged intestacy, or, as in the present case, between one will and another of prior date, the proof being upon the party propounding any testamentary writing, the course of administration directed by the law is to prevail against him who cannot satisfy the Court of Probate that he has established a will; or the prior instrument, which is liable to no doubt, is to be established in preference to the posterior one, which cannot be so proved to speak the testator's intentions as to leave the Court in no doubt that it declares those intentions. There is no duty cast upon the Court to strain after probate, and to grant it where grave doubts remain wholly unremoved, and great difficulties oppose themselves to our progress, which we are quite unable to surmount.

To lay down any general rule beyond this, as to the burden of proof in such cases, is unnecessary—would, perhaps, be impossible—and might also be inconvenient and even dangerous. It may suffice to say, that the proof eminently lies on him who sets up a will; and further, that it is more fatal than to his adversary if he leaves difficulties entirely without explanation. But each case must in this respect rest upon its own circumstances. The facts of that now before us, unexampled, perhaps, in any cause that ever came before any tribunal, leave many things unexplained, many things which no theory that can be formed will satisfactorily account for. But then, it is much less material that those who seek to impeach a testamentary instrument should be unable to explain certain things in their case; should be forced to admit that their argument is not in every point consistent with all the facts; than that they who seek to establish the will should give no rational, consistent, or intelligible solution of those difficulties which encumber their suppositions, and obstruct the path towards the conclusion they would have us arrive at.

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Proof defi-
cient.

It may already be gathered from what has been said, that the Court does not feel it at all necessary to decide upon those points upon which it would be exceedingly painful to pronounce any judgment. We are of opinion, and very decidedly of opinion, that the proof is here left in such a state as not merely authorizes but requires us to pronounce it deficient. We do not feel called upon to say that any fabrication has taken place of the writings propounded, or that perjury has been committed in setting them up. We are of opinion that grave suspicions rest upon material parts of the case which it was necessary to remove before probate could be given, and that they have not been removed; that the testimony of the witnesses relied upon does not counteract the weight which the undoubted facts of the transaction flung into the opposite scale—nay, that there is no great difficulty in reconciling much of that testimony,—indeed, all its most important portion,—with the undisputed facts to which, upon a superficial view, it might seem repugnant. Finally, we think that if the case had been presented to the learned judge below in the same state—the more full state—of the evidence in which we have had to deal with it, he would have arrived at the same conclusion, and that we should have been enabled to affirm, and not called upon to reverse, his sentence.

The disposi-
tions of the
will improba-
ble.

The dispositions of the will in question must be on all hands admitted to constitute a great and a radical improbability in the Respondent's argument, and to leave a great and a radical difficulty at the very foundation of his case. We need not enter into a detail of the arrangements, contrasting them with the state of the family, and the relations proved to have subsisted between its surviving members and the testator. One thing seems clear: there is nothing at all inexplicable or inconsistent in the provisions made by the different parts of that set of testamentary papers which the Appellant seeks to establish, with, perhaps, the single exception of the £10 legacy to the daughter, Mrs. Hamilton, an apparent slight to her, and of which we find no explanation given in any part of the evidence, nor, indeed, in any suggestion of the party. But he gives the bulk of the un-

settled property, that over which he had any power, and of the personal estate, to those whom he was most in the habit of being with, and to whom he shewed on all occasions the greatest affection, and if he omits one or postpones others to the principal objects of his bounty, the former was long departed and settled in a distant quarter of the globe, while the latter were emancipated and established in life at the head of separate families. It must be observed, too, that whatever he gives to his daughters, in the undoubted wills, is settled to their sole and separate use, and placed beyond the power of their several husbands. The principal object of these gifts is Mr. Barton Panton, and to him, his wife, and child, there is the most conclusive evidence that he shewed upon all occasions the strongest attachment. It is unnecessary to shew by what a body of concurrent and uncontradicted testimony this is proved, and by testimony above all suspicion of partiality. Thus, to shew his extraordinary love of the child—if such witnesses as Pritchard and Grace Huxley are to be disregarded, as in the Appellant's employ, or Mr. Rumsey Williams, as being connected with him by marriage—we have Mr. Robert Spencer, the surgeon, giving a similar account, and Mr. V. Horne, a professional gentleman wholly unconnected with the case, and who swears to his being under no obligation to the Appellant of any kind; and his evidence is, perhaps, the strongest of the whole, to shew how entirely Mr. Jones Panton doted on his grandchild, as well as to prove his affection for her parents. "I could not help noting," said Mr. Horne, "the extraordinary affectionate terms on which the deceased and his son, and particularly Mrs. William Barton Panton, appeared to live. He seemed quite wrapped up in them and their child." After describing his constantly associating with Mrs. Barton Panton, and her accompanying him even when he went to enjoy the amusement of the chace, by looking at it, he says, he spoke of her "affectionate attentions to him," adding, that her whole object seemed to be "making him happy and comfortable," and that "he knew not what he should have done without her." After dinner, scarcely had the cloth been removed, when he asked of the servants

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"Where little Missy was?" She was immediately brought, and the nurse took her to him as a matter of course. He put his knee out, and patting it with his hand, said, "Come here, my little pet, or little darling," or some such term of affection; he nursed the child for some time, and seemed, says Mr. Horne, "most amazingly fond of it." He proposed her health, not as a regular toast, but saying, in a familiar way, "Here is little Missy's health." This was the first time of Mr. Horne being at Plasgwyn; he was a stranger, accidentally invited in the course of an election canvass, and the affection of Mr. Jones Panton was so full to overflowing, that it thus gushed out irrepressibly in the presence of strangers. In 1836, some months before his death, the same respectable witness again visited the old gentleman, and observed the same affectionate attachment to prevail on his part for his son, his daughter-in-law, and his grandchild, save that he does not recollect her health being drunk, though he adds, that it might have been so without his remembering it.

Mr. R. Spencer is equally unconnected with the party producing him as a witness, save that he hunted with him, and thus became a visitor at the testator's house. He gives the same evidence as Mr. Horne; adding, however, the account of his demeanour towards the child at table; that, "in numberless ways, he evinced his fondness for the child, and his anxiety about her; the whole tenour of his conduct being that of fondness and affection." Mr. Spencer speaks also distinctly to his fondness for the Appellant and his wife.

Declarations.

The same two witnesses, Mr. Horne and Mr. Spencer, give very important evidence of declarations by the testator, concerning the disposition which he had made of his property—a disposition altogether in accordance with the extraordinary affection which both had observed him to entertain for his son and that son's family. Mr. Horne says, that when he first visited him, in 1832, the testator said, mentioning Mr. Barton Panton having a very nice house at Beaumaris, that "he had left him the most he could." Mr. Spencer saw him immediately before his decease, that is, on the 10th May, 1837, when he said, in reference to a letter of

Sir R. Williams, about giving up his hounds, "I have taken care that, in the event of my decease, he shall be able to keep a pack of hounds as long as he lives or likes, as well as any gentleman in the county of Anglesea." These are very important circumstances; because, if the will set up by the Respondent be genuine, then the testator was practising a course of fraud and imposition; not merely doing acts of dissimulation, but of simulation, wholly unaccountable, and endeavouring to deceive not only his son and his daughter-in-law, but every stranger that approached him, and prosecuting this course of treachery and deception up to the latest moment of his life.

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Nor are such declarations to these two respectable witnesses the only tokens of duplicity, and even of constant and persevering fraud, which the testator must be admitted to have given, if the will sought to be established be the true one. Mr. Bettiss, on the 4th May, 1837, immediately before his decease, was with him on a visit, and he swears that the testator said, referring to a promise he had made his son to leave him the bulk of his property, on condition of his living with him all the rest of his days, that he wished the witness to see that he had realized this promise. He then gave Mr. Barton Panton all his stock receipts for £28,000 or £29,000, with his plate, wine, and library, money in the house, and at his several bankers in Holywell, Mold, Chester, and Carnarvon, with his household furniture, farming stock, and arrears of rent. On a subsequent day, he made Mr. Bettiss bring his will from Mr. Rumsey Williams, who had the care of it, and repeated what he had said of the gifts to Mr. Barton Panton. He frequently saw him during the interval between that time and his decease, and his behaviour towards Mr. Barton Panton and his wife was the same to the last. "He manifested the strongest affection and regard towards them, and," says the witness, "it is impossible to detail the particular modes in which he evinced it; it pervaded the whole of his conduct and manner towards them." "They, or one of them, generally gave him his medicine; and he frequently, in my presence, declined taking it except it was given to him by either Mr. or Mrs. Barton Panton."

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of the Respon-
dent's hypothe-
sis, as to the
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It is not with a view to prove any thing in the nature of a *donatio mortis causa* that we have made reference to Mr. Bettiss's evidence, but to shew how inconsistent the testator's conduct towards his son, in respect of his personalty, was with the supposition that he had all the while made a will in his son-in-law's favour, carefully concealed from his son and his family, as carefully concealed from all who came near him. It may be observed that, difficult as it is to confine human caprice within any assignable bounds; hard as it may be to set limits within which fraud and trick may be prosecuted; such elaborate instances of treachery, such curious, such exquisite combinations of deception, such a studied habit of acting for the purpose of deception, are extremely rare—they are out of the ordinary course of human conduct; and it may be added that, in proportion as men approach the latter stages of this mortal existence, when their faculties become impaired, their memory fails, one portion of a scheme fades from the mind before its corresponding part can be executed, and their firmness of purpose to persist in any train of deception is sapped; the difficulty becomes very much increased, and the improbability is therefore in proportion augmented of their continuing steadily to practise such duplicity, to act on such a system, to play daily and hourly the part assumed of hypocrisy and falsehood. The case for the Respondent supposes, in this old man, a power of acting a part, a degree of constant self-possession, a faculty of having all his wits about him, in order successfully to deceive all who came near him, which would be exceedingly difficult to believe in a person not full of years, and labouring under the infirmities of age, but in the unbroken possession and vigour of his youthful faculties.

Nor can we admit that the attempts to discredit Mr. Bettiss were attended with any success. He may have shewn some activity in helping the Appellant in his preparations for the cause, and yet given no ground for the supposition that he had perjured himself in his behalf. The contradiction endeavoured to be shewn between his testimony and that of Mr. Spencer is really very trivial, and fails to pro-

duce any sensible effect in impeaching his evidence. It is said that he denies (interrogatory 52) having had any interview with Mr. Rumsey Williams, since his examination began, or having communicated with him or any one else examined as a witness, except seeing J. Rowley at Carnarvon; whereas Mr. Spencer, in answer to the 41st interrogatory, says, Rumsey Williams, Oldfield, and himself dined together with Bettiss, after the time in question. But surely Bettiss might have supposed the interrogatory he answered to regard a particular personal interview with Mr. Rumsey Williams, different from merely meeting him in company with others at dinner; not to mention that, if he recollected the circumstance, he never could have intended to deny upon his oath a circumstance known to three, if not four, other persons who could contradict him; for, besides Messrs. R. Williams, Spencer, and Oldfield, present at dinner, Mr. Powell is stated by Mr. Spencer to have come in to them after dinner, and drunk wine with them.

Perhaps the most glaring contradiction between the real undisputed testamentary conduct of the deceased and that which the case of the Respondent sets up,—between the real and apparent demeanour of the testator towards the different members of his family,—between the acting and the pretences of Mr. Jones Panton, supposing the Respondent's case to be a true one,—is the execution of the codicil, 7th May, 1837, and the declarations and even transfer of his personality spoken to by Mr. Bettiss, as taking place on the 4th and on the 10th of the same month. We are called upon to believe that the same person who, on the 4th, declared Mr. Barton Panton to be his residuary legatee, and bade a witness take notice of such his intention, which he even endeavoured to execute by an actual delivery of part, and a symbolical delivery of the rest, did, three days after, unknown to his son and all the world except Mr. T. Williams, execute and publish a codicil confirming the will which, in November, 1834, he had made and published, also clandestinely, it being known only to the same Mr. T. Williams and his three servants, which will had stript his son and all his other children of their whole share of the residue, and

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given it all to Mr. T. Williams's wife, that is, to Mr. T. Williams himself. And we are further desired to believe that other three days did not elapse, after the making of this codicil, before he again declared his unaltered disposition in Mr. Barton Panton's favour, recapitulating the gifts he had made him of his whole personalty,—although all that personalty had, three days before, been willed away to another, and accompanying this gross fraud, this glaring and most gratuitous falsehood, with a remark that he had not long to live,—that he should not be with his children long.

This flagrant inconsistency forces our attention very strictly and watchfully upon the confirmation of Mr. Bettiss's story, on the one hand, and upon the codicil of the 7th of May, on the other.

Beside that there is nothing, absolutely nothing, in Mr. Bettiss's narrative at all inconsistent with the testimony of the other witnesses, and with the admitted facts of the case, especially the warmth of the testator's attachment to Mr. Barton Panton and his family, the act of sending to Mr. Rumsey Williams for his will in Mr. B. Panton's favour is a strong confirmation of Mr. Bettiss's testimony. Mr. R. Williams swears to the very same facts, which must be true if Mr. Bettiss's account is so. And there are produced, a note of Mr. Bettiss to him, informing him that it was his will which the testator wanted to have, and which Mr. R. Williams had wholly forgotten having the possession of; and a note of himself (R. Williams) in reply, promising to bring it over to Plasgwyn in a day or two. He also deposes, that he took it with him accordingly the day but one after, that is, May 12th, when the testator looked it over, saying he intended to add a codicil, giving Mr. T. Williams's wife £2,000, instead of the £200, to which, by one of the undisputed codicils, he had cut down her legacy; but he could do so in a few days. He then delivered the will and codicils already executed to Mr. B. Panton, saying, "Here, Barton, are my last Will and Codicils—keep them." Now, this is not only such a confirmation of Mr. Bettiss's evidence, as seems quite conclusive in its favour; but it is an act of so very nearly the same import as the acts detailed

Mr. Bettiss, that the case would be substantially the same were Mr. Bettiss's evidence wholly rejected, and the case rested on Mr. R. Williams's alone: for the only use which we are making of Mr. Bettiss's evidence is to shew how entirely at variance with his whole conduct on the 4th and the 10th, and the 12th, it is, to suppose that he executed the codicil of the 7th, and that codicil is just as much at variance with the facts which Mr. R. Williams swears to have taken place on the 12th, as it is with those facts which Mr. Bettiss swears to have taken place on the 4th and the 10th.

It is not immaterial to remark how sorely pressed the court below was with the circumstances to which we have now adverted. "That Mrs. Williams," says the learned judge, "should have been substituted for Mr. Barton Panton, against whom the testator appears to have had no cause of complaint whatever, is a circumstance which the court cannot well account for. There is," most truly adds the learned Judge, "no trace in the evidence from which the Court can collect that there was any diminution of affection and regard on the part of the deceased for his son, or any thing but the most respectful attention on behalf of the son to his father." The learned Judge then goes on, with equal accuracy, to ask what could have caused the sudden preference of Mrs. Williams to her brother? for, though a confidence to some extent seems to have been placed in Mr. T. Williams by the testator, yet it appears not to have been unlimited, because he, Mr. T. Williams himself, deposes that he only learnt after his father-in-law's death the fact of his having given Mr. Barton Panton possession of his will made in 1828, and also that when, according to Mr. T. Williams's own story, the testator gave instructions for making his alleged will of 1834 and his codicils of 1836 and 1837, he never intrusted to him the existence of the will of 1828,—a will which the testator could not possibly have forgotten, because it was engrossed on several skins of parchment, and recited the marriage settlement of 1824, the object of his great aversion, and the dispositions in favour of his three daughters:—the learned

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Judge, therefore, justly concluded that no ground is laid of any probability that so complete an alteration of the testator's intentions should have taken place as the Respondent's testamentary papers suppose.

We have said that, if these considerations necessarily direct our jealous attention, on the one hand, to the confirmations which arise to Bettiss' testimony, they also, on the other hand, call for a scrutiny of the confirming codicil of 7th May, 1837. And here we are, in the outset, met with the remarkable circumstance, that it really effects nothing, and seems to be made with no intelligible object. Few men of 76, within a very short time of their decease, and when aware of their latter end drawing nigh (as Mr. Panton appears to have been), are very fond of making wills, even when they had previously omitted that duty. But here we are required to believe that Mr. Panton made a codicil, within three weeks of his death, for no other purpose than to confirm a will already duly made and published,—unless it be that he gave a legacy of £20 to a serving woman. Then it is to be observed, in the next place, that the will which this strange codicil confirms, extended over real as well as personal estate,—the real estate being given to others, the personal to Mr. Thomas Williams; and the codicil is not witnessed so as to affect real estate in any way, but it is perfectly sufficient to confirm by republishing the former will, as far as it bequeathed the personalty, and as far as it named Mr. Thomas Williams his executor. Thus, no one but Mr. Thomas Williams could possibly benefit by this codicil—even as regards its total inefficiency to operate upon any thing but the bequests made to, and the appointment made of, him by the will, and which it confirmed. But, again, the question arises, and presses us: why was any confirmation to be made at all in May 1837 of the will of November 1834? If that will of 1834 was perfectly genuine and authentic, if it stood unrevoked by any subsequent testamentary act intermediate between its date and the date of the codicil,—if, in short, the case is as represented by the Respondent, of what possible use could be the codicil confirming it? In other words, how can this

codicil tally with the case of the Respondent? Then, does the supposition of the Appellant explain it? In other words, does it tally with his case? Past all doubt, it does, and most manifestly and exactly:—for if the party setting up the will of November 1834 was apprehensive of any testamentary act having been done by Mr. Jones Panton after that date, the confirmation of the 7th May, 1837, by a new codicil, at once removed all such intermediate acts out of his way, and republished the former made Will in his favour. In any view, therefore, which can be taken of this important portion of the case, we see that it bears against the contention of the Respondent and for the contention of the Appellant.

Nor ought we to pass by one very remarkable discrepancy, which is to be found in the will of November 1834, compared with the provisions made in the unquestioned testamentary acts of the deceased. The daughters are the objects of his bounty, more or less, but always to the exclusion of their husbands; but, in the will set up by Mr. Thomas Williams, he is himself the object of the testator's bounty; all is left to his wife, but not to her sole and separate use. The will might just as well have been made directly in his own favour.

It is labouring under the cloud of these improbabilities, that the Respondent's case presents itself to our view, in order that we may examine whether or not the will propounded in such circumstances is really shewn to be the authentic record of Mr. Jones Panton's intentions touching his property. It is hardly necessary to observe, that all such considerations as we have been dealing with would vanish at once, and leave no remains of their impression on the mind, were we to find that the execution of the conflicting instruments was free from all question—that the witnesses proved them to have been duly made and published by the deceased. This would only force us to the conclusion that he had acted a part of great, inexplicable, and difficult duplicity; that he had been playing a part not easily comprehended by us, any more than easily acted by him, and a

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part yet more reprehensible than it is incomprehensible. But the difficulty of understanding his motives, or of excusing his falsehood, would afford no argument against the clear evidence of his having done the act; there would at once be an end of all question, and the sentence appealed from must be affirmed. Even the strongest of the circumstances which we have enumerated and considered, would disappear before clear and indisputable proof of the *factum*. But it must be added that, in exact proportion as these circumstances and these considerations tend to render the *factum* improbable, must the proof of so unlikely a fact be clear and strong. The credit of the witnesses must be unimpeached; it must also be ascertained, supposing them the witnesses of truth, that they really understand what they are attesting; it must be made certainly to appear that there is no other way of accounting for their evidence, without believing in the improbable story which they tell.

The *factum*
of the will.

In approaching this part of the case, it is unfortunate that the first circumstance which we encounter is one of a kind to excite new suspicions, to require additional explanation, instead of having any tendency to confirm the proof of the *factum*. The will mainly relied on is in the handwriting of the legatee, the party propounding it, and in whose favour it is made. Nothing can tend more to excite the jealousy of a Court of Probate than this. It is of course not an insuperable objection, but it makes all the rest of the case more suspicious, and the more imperatively calls on us to watch the testimony of the witnesses the more jealously. The will is not, as it ought to have been, to be safe, prepared by an indifferent professional man, and no explanation is given of this radical defect. To say that the testator was of a jealous temper and a reserved disposition, will not do. He had other attorneys and solicitors within his reach, and he had before employed no less than six of them in different testamentary acts.

The witnesses. Then, who are the witnesses? All of them, the servants of the legatee propounding the instrument. To say that the testator preferred these to others, for the purpose of con-

cealment, will not do. He had already adhibited no less than five other witnesses to wills and codicils formerly made and published by him.

The place, too, where the *factum* is alleged to have been, is not immaterial. It was at Mr. T. Williams's residence. There, with only himself to write and to preside over the execution, and only his three servants to witness it, this will is alleged to have been made, and each witness swears that the party propounding enjoined strict secrecy as to the act they had been witnessing, and the attestation they had severally given.

With our suspicions thus greatly increased, we are to examine their testimony. Two only of the three survived, and alone were examined. The most important of these is Ellen Evans, a person of an origin somewhat above her station; a person, however, in the same proportion, friendly to, and connected with, her master and mistress, who treated her in some sort as a companion, rather than a servant. Now, it is plain that her credit is not a little shaken by the manifest contradictions which her second examination presents to her first, and on a material point. On the important question, whether or not her fellow-witness, John Williams, could write, she contradicts herself in four essential particulars. She had, at first, said, that he could not write when he came into the service, but was obliged by his master to learn, in order to sign receipts. She afterwards, on the issue raised respecting John Williams being able to write, swears that he could write before he came into the service. She at first said that he could only write his own name, and that this was all his master had him taught. She afterwards says, that he wrote other persons' names, and also figures, in a kind of day-book kept by him. At first she swore that she had only seen him write the three times that he attested the papers in question: afterwards, she swears that she had many other times seen him write. Lastly, she, at first, said that she knew he had learnt to write by his master shewing him how, by his practising the copy of his name, "J. Williams," set him by his master. Afterwards, she says that she never knew till lately how or where he learnt, and that it was at Bangor

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National School. It may most fairly be affirmed, that a witness who gives such a discrepant account as this—more faintly swearing when the fact is less material; more and much more strongly swearing, and to wholly different things, when the fact is of more consequence, an issue being taken upon it;—is by no means a witness on whose testimony reliance can be placed to set up a will against the great load of improbability under which these papers labour. Such witnesses only add to the suspicions previously overspreading the case, and are far indeed from allaying or removing them.

Practice of
Court Christian,
as to evidence.

If it be asked, how the Court below gave so little weight to this objection, I conceive the explanation is at hand. In the Courts Christian, the practice is to plead the evidence, and to take issues upon the facts severally. If this course is, in some respects, favourable to the discovery of truth, it also, in some respects, is unfriendly to a correct weighing of evidence, for it tends to draw the Court's attention from a view of the testimony different entirely from, and independent of, the issue on which it is adduced. Thus, the Court below appears only to have considered the variations, or rather the direct contradictions, in Ellen Evans' testimony, with a view to estimate their bearing upon the matter put in issue, whether or not John Williams could write; whereas, granting that it did not disprove the affirmative of that issue, these contradictions were most material to an equally important point, the credit of Ellen Evans herself, as a subscribing witness.

Agreeing with the learned Judge, that there is, upon the whole, reason to believe in John Williams's ability to write, as far, at least, as signing his name—though the learned Judge comes to this conclusion with much hesitation, and many comments on the proofs of it apparently withheld,—and agreeing also in his other conclusion, that Ann Williams could write,—a conclusion come to also with some doubt and difficulty,—we have now to observe that the witnesses give the same negative evidence on a very important point, namely, their having or not witnessed any other instrument of the testator on the same day. Now this is a most important answer to a most important question; for all

these witnesses are persons more or less ignorant and illiterate, especially Ann Williams, and John Williams, who is not examined, being dead. Ellen Evans, who is considerably their superior, is so discredited by the irreconcilable discrepancies in her evidence already adverted to, that, if Ann Williams may easily be supposed to be mistaken in the more material part of her testimony, the evidence of Ellen Evans, besides that she too may have fallen into a like error, would by no means be sufficient to prove the will against the numerous improbabilities which encumber it. Every thing, therefore, depends upon their negative being believed to the question, whether or not they had witnessed another instrument on the same day; and although, in the Court below, no great doubt was cast on the account which they gave, and it was believed that they had only witnessed the will, yet we here are possessed of a complete contradiction to that story, and have before us another instrument, not a will, but a deed, of Mr. Jones Pantton, which they now appear undeniably all to have subscribed.

Let it now be remembered that Ellen Evans and Ann Williams employ the word "deliver;" both say that Mr. Jones Pantton said, "I deliver this," adding, no doubt, "as my last will and testament." Neither of them says "publish." If they signed as witnesses to a deed which he executed on that day, they must have heard him say that he delivered it as his act and deed. How easy for illiterate persons to confound the two together! But, again; he never could have said "I deliver." He, who had executed so many wills and codicils, never could have so spoken, nor Mr. T. Williams, himself a solicitor and proctor, have allowed him to use the word "deliver," which is perfect nonsense in the case of a will. In one part or other, therefore, of the sentence spoken to, these witnesses both agree in making a great mistake. The Respondent says, he must say, that they substituted the word "deliver" for the word "publish." Why are we precluded from saying that they substituted the word "will" for the word "deed," while they accurately gave the word "deliver?" But this would explain every thing, and reconcile the parol testimony of those witnesses

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with the whole probability of the case. Besides, Mr. Thomas Williams may have used words different from the testator. While the testator, in executing the paper which he took for a deed, may have said, "act and deed," Mr. Thomas Williams may have repeated the words, substituting "will and testament," and the witnesses may have confounded the word used by the one person with those used by the other. And this explanation—this solution to reconcile conflicting facts, and explain mysteries and difficulties, was not before the Court below. We have no doubt that it would have most materially affected the opinion pronounced, because that opinion was avowedly come to with great hesitation and great misgiving—come to in a way that shewed how evenly balanced the scales hung in which the opposite facts and reasons were weighed.

The pencil-
marks.

We have now gone through the main facts and arguments in this extraordinary case, without making any reference at all to the most striking peculiarity in the whole,—the pencil-marks found to have once been made upon, but afterwards to have been erased from, the paper on which these instruments were written, and we are the more satisfied to have postponed the consideration of this circumstance to the last, because the learned Judge in the Court below did not take altogether the same view of it with which we have been impressed, and therefore it is more satisfactory to decide upon grounds in which both Courts are more or less agreed. But the marks afford certainly a strong additional ground for refusing the probate.

The name of the testator turns out to be subscribed to instruments in the Respondent's and legatee's handwriting, on paper not clean and used for the first time, but paper on which there had been originally drawn lines, to give the writing a tabular form; and writing consisting of the names and numbers of certain houses, forming the London property of the testator, of which the document appears originally to have been a map or plan. Now, that he signed these pencil memoranda; that they were carefully effaced by rubbing, and that, on the paper whereon they had been in pencil written, the wills were written by Mr. Thos. Williams,

over the testator's signature, appears to be the result of the evidence, somewhat, but not very, conflicting, which has on either side been adduced; and, if this be true, there is of course an end of the Respondent's whole case, were there nothing else in the cause.

The issue taken for the Respondent is, that these marks were made after the scripts produced by him had been brought in and were in the Registrar's hands, and he reasons thus:—the marks were put in by the Appellant, or some one connected with him, in order that they might be discovered, and that their discovery might be made a ground for discrediting the instruments and defeating the Respondent's claim to have probate of them.

This appears to be a very far-fetched and overstrained hypothesis. It ascribes to the Appellant a plot of the most difficult execution and most round-about aspect. The Respondent accuses his adversary of getting hold of the documents in the Registrar's hands, writing words and lines in pencil on them, rubbing out greater part of those marks, leaving, however, some remaining, in order that they might be seen and read, and that upon them might be grounded the inference of Mr. Jones Panton's name having been originally signed to the pencil memoranda, and used as the signature to Mr. Thos. Williams's writing of testamentary papers. Nor should it be lost sight of, in considering this very strained hypothesis, that the subject-matter of the pencil-marks was most strangely chosen. An agreement, or a letter, or almost any other writing than a map or plan of houses, would naturally have been resorted to by the contrivers of such a plot formed to discredit the papers; surely, the most remote thing from such a one's ideas must have been to draw the plan of the testator's London estate, with the names of the streets and numbers of the houses: so that, upon the whole, nothing can be more heavy than the draught upon the Court's credulity which such a supposition makes. The utmost, the very utmost, that can be said for it is, that, if some facts were given in evidence to prove it, we might be induced to believe it. But the mere suggestion of such an hypothesis, with equivocal circumstances, or doubtful, in its support,

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never can avail. There is here no testimony of any weight or any certainty in its behalf. The time assigned for the insertion being between the 18th and the 22nd of January, several persons have been examined to prove that they saw the papers before the 18th and saw no pencil-marks upon them. This really is of no weight. Unless those persons can swear that they closely examined them, with a view of discovering such marks, what avails it to say that they saw none? By the supposition—the supposition common to both sides, because it is the fact,—those marks were all but entirely erased; they were intended to be erased, and only accidentally and partially left on the paper, says the Appellant; they were intended to be so nearly erased, that a cursory inspection never could have detected them, says the Respondent—at least, so he must say, else his hypothesis is absurd and self-destructive, inasmuch as the leaving apparent marks, marks discovered at a glance, must defeat its design, by making it impossible that any one should have intended so clumsy a fraud, and so making it impossible thus to cast discredit upon the scripts in question. Wherefore, no cursory examination could, on either supposition, suffice to detect the marks. The very last thing any observer could suppose to be in the papers was the remains of a former writing in pencil, because the very last thing that any one could suppose was, that such instruments should have been written on any but virgin paper:—and we all know how many things escape observation when the attention is not specially pointed towards them.

But it is not merely a deficient proof under which this hypothesis labours; there are things to be accounted for by him who maintains it; there is a burthen of proof cast on him who maintains it, and of that load he has not discharged himself. The marks must have been imposed by some one, and in some considerable time; for time must have been consumed in writing them, and more time in partially erasing them. Then, when and by whom could this have been done? The papers were in the hands of the Court all the while, and Mr. Jennings has distinctly sworn to his close custody of them. His evidence is uncontradicted and un-

impeached, the only attempt failing, which was grounded upon an incorrect statement of what he had sworn at the trial in the Central Criminal Court—incorrect through the error of the short-hand writer—an error clearly shewn by a moment's consideration, because no man could possibly have said, or at least meant to say, that he had gone to a church two miles distant, then to another church a quarter of a mile off, and never was absent one hundred yards from the house. The learned Judge of the Court below entirely acquits Mr. Jennings of all discredit arising out of the supposition that he could so have sworn at the trial. He also, after a laborious examination of all the evidence, arrives at the conclusion, perhaps the most clear and unhesitating of any to be found in the whole of his very able judgment, that it is "utterly impossible, almost incredible, that these marks should have been impressed upon the scripts after they came into the Registry of the Court." Their Lordships entirely agree in this opinion.

Nor is it merely by not undertaking the burthen of proof, and satisfying its exigency, that the Respondent fails to support his hypothesis: the inspection of the writings makes directly against it. The pencil-marks should be over the ink-writing—at least, in many parts—if the marks were made after the instruments were written. Instead of that, with one trivial and accidental, though unexplained, exception, all the ink is apparently over the pencil.

It is difficult, on the other hand, to understand how the testator should have signed these memoranda. The evidence of the London solicitors goes to prove that the arrangement was obligatory on him, and required not his approval or signature. This, perhaps, is not very material, because he seems to have sometimes written things not very necessary or very useful—as, for example, his pencil memorandums. But his signing his name with ink to a memorandum written in pencil is not so easily explained; and, accordingly, the attempt was made to shew that he had originally signed with a pencil, and that his signature had been traced over afterwards with a pen and ink. The inspection of the papers seems to shew that this process may have been per-

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formed in one, perhaps in two, instances, but certainly not in all. We must, therefore, leave this difficulty unexplained, remarking, however, that it is not by any means sufficient to countervail the rest of the proof, and to cast back the balance in favour of the instruments.

If the hypothesis of the Respondent fails, the import of the pencil-marks is strong, and it is decisive, against him. It would be so without more than their existence; but there are two circumstances, worthy of our attention, which carry conviction at once to the mind—the one less forcibly, the other more forcibly. One of the scripts is signed on the right-hand corner of the first page of a folio leaf, part of a folio sheet, shewn by the vertical folding-mark to have originally been a common foolscap sheet of long paper. But the writing is not confined to that leaf—it goes across the whole sheet, which has been unfolded to receive it. Now, nothing can be more certain than that the writer, who is Mr. T. Williams, the Respondent, would naturally, on taking up such a sheet, have written, with or without a margin, on its first page, then turned and continued on its second, or, if he meant to leave a blank leaf, on its third, and made the testator sign at the end of the writing on that second or third page. To open the whole sheet, and write across it, would never have been the course pursued, except when a plan or map was to be written. Moreover, in this script, there are pencil-marks, but all on the right-hand page—none on the page prefixed to it, as it were, by unfolding the sheet. How hard it is to avoid the conclusion, that some one, finding those pencil-writings on the first page of the sheet, with the name “Jones Panton” signed at the end of them, on the right-hand corner, but having more to write than could be compressed within that one page, opened the sheet, in order to obtain room for all he had to write, and in order to prefix that all to the signature!

Again, in the instructions for a will, we have a date in pencil-marks, which can only be “one thousand eight hundred and thirty-six,” for the fragments of this date are plain; namely—*thousand*—*and thirty*—with the letter *s*, after a short interval. But the will purporting to be

drawn from these instructions is dated November, one thousand eight hundred and thirty-four. How hard to escape the inference, that the will was written without any such instructions, and written two years after the date which it bears!

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A third circumstance, pregnant with grave suspicion, is to be remarked in two of these papers. The writing is not equally large and equally widely placed in all the parts. It seems as if the writer had calculated on being able to compress the whole that he intended to write within the space of the page above Mr. Jones Panton's name, and had begun to write large and wide, but that, finding he had miscalculated, he ended by writing in smaller hand, and with narrower intervals between the lines. It is very difficult to avoid the inference that the signature of "Jones Panton" was written before and not after the instrument, and that the writing was filled in so as to make it appear, and falsely appear, to have been signed by him.

Some difficulties have been suggested as making for the authority of these instruments. First, it is asked, why a person engaged in fabricating a will should have exposed his work to so many risks of failing, and the workman to so many chances of detection, by multiplying the fabricated documents needlessly? But, not to mention that their number in some sort strengthened his title, nothing can be more dangerous than reposing confidence in such a topic. It is fortunate that men concerned in frauds have not all their wits always about them; if they had, their escape would be generally secured. Then, it may be asked, why the erasure of the pencil-marks was left incomplete; why a more concise disposition was not made in one codicil, to avoid unfolding the sheet and crowding the writing; why, above all, in another paper, the date of 1836 was not more entirely effaced, when it was to contain instructions for a will in 1834? There is no end of such inquiries, and they would tend to prevent any malpractice from ever being believed to have been committed: if they failed to prevent men from doing wrong, as they perhaps ought to do, they only lead to

Suggestions
in favour of the
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the impression that it is scarcely possible for fraud to be practised with perfect circumspection.

In support of a will written in the hand of the legatee, it is usual to require the confirmation arising from previous instructions or subsequent adoption, both proved otherwise than by the statement of the legatee. These confirmations have accordingly both been attempted in this case, and, their lordships are of opinion, attempted without success.

Attempted
confirmations.

A memorandum in the testator's handwriting has been proved. It is written on a scrap of paper, on which he had been writing some angry sentences respecting a fraud practised upon him, as he supposed, probably respecting the settlement on his son's marriage. But this memorandum really proves nothing; it is wholly confined to his real estates, unless we suppose the words which appear there, "rest to Lauretta Williams," refer to personalty. But they do no such thing; their import, in connection with and sequence to the other part of the writing, only referring to real estate.

This memorandum, however, at once furnishes an explanation of a difficulty suggested against the Appellant's case, when it is asked why the fabricator of these scripts should have given the real estates by will, when they were almost all in settlement? The answer arises out of this autograph memorandum; as it refers exclusively to these estates, it became necessary, or at least expedient, for the purpose of giving the fabricated instrument a colour of authenticity, to adopt into that instrument the disposition made of these real estates, in Mr. Jones Panton's handwriting, and so to connect the fabricated document with something that proceeded undeniably from the testator.

Testimony
of Mr. Gethin
Williams.

Next, a confirmation by adoption is sought in the testimony of Mr. Gethin Williams, who says that Mr. Jones Panton once told him he had appointed Mr. T. Williams his executor. The words, it must be observed, in which this witness so deposes are not a little singular: "I hope you will take care of poor Laura, if any thing should happen to Tom—he is my executor." Can any thing be imagined

more strange than this way of talking of his daughter? He recommends her to a mere stranger, her husband's brother; and, anticipating the death of her husband, recommends her to the elder brother of that husband, as if on that account he was sure to survive him. Then what kind of connection can there be between the recommendation and the words added, "He is my executor?" The recommendation is in contemplation of Mr. T. Williams's decease, and, after that event, his being executor or not, while he lived, seems exceedingly immaterial; unless, indeed, Mr. J. Panton also knew, which is nowhere suggested, that the brother—the elder brother—was to be Mr. T. Williams's executor, as Mr. T. Williams was his. Nothing can be less intelligible than this statement, and the change of a word would make it wholly immaterial, as it is almost wholly inexplicable.

But Mr. G. Williams cannot be said to have such an accurate understanding as would be required to make an implicit reliance on his memory and on his distinctness of apprehension and of statement very safe for the Court. This is made plain by a reference to his examination upon the 11th and 13th Interrogatories, which, moreover, indicates a great bias on his mind in his brother's favour, and an extreme readiness to give reasons which may both enonerate himself from suspicion of partiality, and support his brother's case. On the 11th, he speaks of a security which he has taken for money lent to Mr. T. Williams; but, though he begins by saying that Mr. T. Williams has other property beside his wife's £7,000—and which is, indeed, not at all his, being settled to her separate use—he immediately says that all he knows of is a reversion of £1,000, expectant on the life of some one not married, and in the will of Eliza Panton, without ascertaining if that, too, be not settled to his wife's separate use, in whose right alone the probability is that he has any title to such a reversion, coming as it does from one of the Pantons. But, on the 13th, he shews still greater readiness, or still less clearness, of apprehension. He is clearing himself of all interest in the cause, and he swears that he never lent his brother any money to carry it on. But

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then, he says, he did, in February, 1838, lend him £1,000, and as this was in the middle of these proceedings, he adds immediately, "But it was not to assist in carrying on this cause." Then he adds, "On the contrary, I expected he would have invested it, and I dissuaded him from applying it to assist him in these proceedings, though eventually it went to pay the costs of the trial." What can all this possibly mean? When Mr. T. Williams applied to his brother for a loan, was it because he had plenty of money, or because he wanted pecuniary assistance? Then, could his brother possibly doubt that whatever he might lend him must be applied to the costs of the suit? To say, "You are in want of £1,000; here it is for you, but mind you don't spend it in prosecuting your claim to £60,000 or £70,000, under Mr. Jones Panton's will; and as you have no money to carry on that suit, see that you apply this £1,000 in buying stock, or in lending on mortgage,"—seems wholly contrary to the common course of men's transactions, and entirely incomprehensible. So that, whether from his indistinctness of conception, or from his over-abundant zeal for the party, his near relation, for whom he swears, we shall not be justified in making his very singular account of the one solitary conversation with the testator a ground—say, the sole ground—whereupon to rest our decision in favour of testamentary papers which stand so much in need of other and more ample confirmation.

Papers
pronounced
against—Judg-
ment appealed
from reversed.

Costs.

For these reasons, we consider that these papers have been propounded upon a body of proof which entirely fails to establish them; and the sentence of the Court is, to recal the probate of them, and to admit to probate those scripts propounded by the Appellant. In this Court, as well as in the Court below, each party must pay his own costs.*

Proctors:—*French*, for the Appellant; *Wadeson*, for the Respondent.

* The Committee was composed of the Lord President (Lord Wharmcliffe), Lord Brougham, Mr. Baron Parke, and Mr. Justice Erskine.

High Court of Admiralty in Ireland.

AUGUST 23, 1843.

THE QUEEN v. THE "WINDSOR CASTLE;" MEILICAN AND OTHERS, INTERVENIENTS, v. THE SAME.—This cause is instituted by her Majesty's Proctor for Ireland, on behalf of her Majesty, against the ship and her cargo, consisting chiefly of cotton, as derelict droits of admiralty, and the intervenients libelled as salvors thereof. Subsequently, the owners of the ship and cargo put in their claims, paid the costs of the Crown, and tendered in Acts of Court £1,000 for the salvage services of the intervenients. This tendering been refused, and a matter contrary and defensive, denying the salvage services of the intervenients, having been pleaded on behalf of the owners, and several witnesses being examined, the case on behalf of the intervenients came on for hearing in the Court at Dublin; when *Gibbon, D.*, stated the case on behalf of the intervenients, the facts of which are fully set forth in the judgment; *Byes, D.*, and *Fitz-Gibbon, Q. C.*, also appeared for the intervenients, and *Gayer, D.*, *Radcliffe, D.*, and *Battersby, D.*, the owners of the ship and cargo.

Derelict. — Salvage accomplished by fishermen with great intrepidity and skill, and at considerable risk. — One-fourth of a large property awarded to the salvors.

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DR. STOCK.*—This is a suit in which the intervenients, August 23. David Meilican with thirty-four others, fishermen of the County of Clare, in the parts adjacent to the mouth of the River Shannon, claim salvage for the preservation of the ship *Windsor Castle*, of Liverpool. This ship is of 700 tons register per register, and capable of carrying 1,000 tons. She was laden with a cargo of raw cotton, the growth pro-

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* Joseph Stock, Esq., LL. D., Q. C., her Majesty's First Serjeant-at-Law, Judge of the High Court of Admiralty, Ireland.

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Condition of
the ship.

bably of the United States,* and seems to have been bound for Liverpool on her return voyage from America. What the history of this voyage may have been, or what became of the crew, is unexplained in the evidence, and so far remains a mystery; that it was, however, a most calamitous voyage appears from the result. At daybreak on the morning of the 13th March, 1843, the ship was on the high sea, three and a half or four miles off Loophead, to the north-west of that promontory, which is the termination towards the sea at the northern bank of the river Shannon, and projects into the Atlantic ocean a barrier of high and formidable cliffs. The ship was derelict, having been some time previously (but how long or under what circumstances I know not) abandoned by the crew. The pressure of the danger which impelled the crew to the act of abandonment must, however, I apprehend, be taken to have been very great, for clearly it was no hasty act, but a resolution deliberately adopted. When she was first boarded by the salvors, her state was this—she was dismasted, her bowsprit was gone by the stem, part of the stern was carried away, a piece of the rudder was broken off; her bottom, however, was sound. The masts had, I think it is evident, been cut away by the crew, because they were clean gone, with the chief part of the sails and spars, which were not found encumbering the decks, as would have been the case had the dismasting been merely the work of the winds, and not performed or completed by the crew. Something has been remarked of the scene of confusion which the cabin presented to the observation of those who first boarded. The doors were broken, the lockers burst open, the drawers fallen upon the floor; table upset, and all places strewn with broken bottles, boxes, earthenware, bread, coffee, books, papers, bedding, and other articles, suggesting to the salvors the belief that she had been first abandoned by her crew and afterwards visited by hostile hands. I do not, however, think it neces-

* The vessel was from Bombay, but it did not appear so on the evidence, or indeed from where she was.

sary to make such an inference; the appearances, I think, may be naturally explained by the situation of the vessel, drifting on the ocean in tempestuous weather, possibly for many days, certainly for many hours. But this I collect very clearly, that this ship was abandoned under the pressure of extreme necessity, in a state of the utmost peril and distress, and without the smallest hope on the part of the crew that the property they relinquished could by any chance escape final destruction.

The derelict was in this state when several pilot-boats, belonging to the village of Kilbaha, county Clare, situate on the river Shannon, not far from Loophead, proceeded before day to their usual occupation of fishing at the river's mouth. One of these boats, containing the promovent, James Hanrahan, an old and skilful pilot, and his three comrades, was three miles off Loophead, in a south-westerly direction, and when daylight permitted, these men discovered the dismasted derelict ship, then bearing north-west of Loophead, and being between three and four miles to sea. There was a light westerly wind; the distance of the pilot-boat from the derelict was about six miles; the tide was just on the turn from ebb to flood, and every thing joined and encouraged the design which was then instantly formed of approaching the ship and tendering assistance. In about an hour, or a little more, they made the ship in their canoe, a boat of a peculiarly light and agile description, commonly used in the Shannon. The time at which they neared the ship was about eight o'clock. I think it must have been, at this time and place, about low water, or very nearly at the end of ebb. The nautical books which have been referred to, and Dr. Gayer's argument, establish satisfactorily that such was the case: for it is shewn that, on Thursday, the 16th of March, 1843, it was full moon at five o'clock A.M., and high water at the mouth of the Shannon at forty-five minutes after three o'clock in the morning; and then, by calculating the retardation, it results that, on the 13th, it was high water in those parts at twenty-one minutes after one A.M., and therefore ebb-tide at from half-past seven to eight in the morning.

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Proceedings
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This topic has been greatly insisted on in the arguments of Counsel; and the advocates of the impugnant vessel rely on it as shewing that every natural circumstance on that morning favoured the labours of the salvors—a fair wind, a flood tide, moderate weather, and safe anchorage not very distant from the scene. But it appears to me, and I think very clearly indeed, that if every one of these favouring circumstances had not conspired to befriend the exertions of the salvors, the preservation of the ship would have been nearly and physically impossible. Even with all these favouring circumstances, it strikes me that the success which attended the attempt of James Hanrahan and his companions to bring this vessel into the Shannon, is most wonderful and surprising: I do not believe that a greater feat could have been accomplished by the muscular strength and activity of fourteen or fifteen hardy and intrepid men, than was effected on that morning by those salvors, in clearing Loophead, and thus giving effect to the natural powers of wind and tide, by which, under their management, the derelict ship was brought to an anchor.

Be the state of the tide exactly what it may, it was eight o'clock when James Hanrahan arrived at the *Windsor Castle*. Off Loophead, and on the iron-bound coast of Clare, it need hardly be said that, even in calm weather, a heavy roll of the sea is almost perpetual: there was a heavy roll on this morning, and they were not able to board the ship without some considerable danger of a casualty; one of the men did fall into the sea in doing so, but it is said he was a lubber, and missed his footing by his awkwardness. I hardly believe that can be the case, for, if I can form an idea of nautical agility, it would certainly be in the person of one of these navigators of the Shannon canoes, who, it is said, can run round the gunwale of his light craft when hanging amidst the waves of the ocean. There was danger of boarding the ship even on the morning of the 14th, when at anchor in mild weather in the River Shannon—so great was her pitching and tossing. This is admitted by the impugnants' own witnesses, and if Mr. Baldwin, of the Coast Guard, felt it

dangerous to go on board the *Windsor Castle*, even on the 14th, shall I pronounce it to have been perfectly safe and easy to accomplish that operation at sea on the morning of the 13th? I think there was danger, and a danger commencing then and continuing thenceforward for many hours under various aspects, both from the fear of shipwreck and of plunder, and quite sufficient to try the fortitude of the bravest man.

Hanrahan, having boarded the ship, found her without a living soul: he had one hour before him—perhaps not more than half an hour,—within which it was possible by measures of precaution to effectuate the salvage of the vessel. I have stated her position, three miles to the north-west of Loophead, with a westerly wind and a lee-shore. It is clear to demonstration, and indeed incontestable, upon the evidence of the nautical men examined by the impugnants, that, in that situation of things, being left without assistance, the *Windsor Castle* would have been ashore to the north of Loophead, and become a total wreck. The description of the coast of Clare, northward of Loophead, is well known to all mariners and mercantile men in the world, while perhaps there is hardly a more dreadful and inhospitable coast. The escape of a ship drifting northward would be a miracle.

Hanrahan, intimately aware, from his long experience and local knowledge, of the greatness of the peril to which the *Windsor Castle* was exposed, lost not a moment in adopting the most effectual measures. He got his canoe alongside, and with his three companions, boarded the ship, proceeded to rig jury-masts, and a particular description is given of the three small sails he contrived to set up. He was able to work the rudder to some effect, though it had been broken and injured; the ship obeyed it, and with the sails and rudder he got her head round to sea, the first and most necessary step for her preservation. Immediately after, another canoe, manned by the intervenient Meilican and five others, came up. A tow-line was taken over the bows, and the six men in this canoe now began to tow. Half an

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danger of the
enterprise.

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Its accom-
plishment in-
credible to
some witnesses.

hour elapsed, when the salvors were joined by Martin Hassett and three assistants, in another canoe, and again shortly after by John Kane and three other men, in a fourth canoe; these eighteen men are to be accounted the principal salvors, for to them is due the rescue of the ship from the greatest and most imminent of all the danger in clearing Loophead. The first thing they had to apprehend was her going ashore to the north of Loophead; the second and a greater peril arose in nearing that head where the current and the force of gravitation, bearing on the heavy and inert mass of the *Windsor Castle*, would render the clearing of the cliffs in the very least degree problematical. Now, that there was a difficulty and danger in going round Loophead, I think it evident enough even on the impugnants' own shewing:—that is, on the evidence of the witnesses produced for the impugnants. Captain Triphook, a gentleman of unquestionable skill and experience as a seaman, and then in command of her Majesty's revenue cutter the *Hamilton*, is produced as a witness on the part of impugnants; on cross-examination the salvors ask him:—"Did you not hear, and don't you believe, that the pilots in their canoes found the ship *Windsor Castle*, on the morning of the 13th of March, four miles north-west of Loophead, the wind being west, and the shore a lee-shore, and that they towed her round Loophead from that position?"—"I heard it, but I don't believe it."—"Why not?"—"Because the thing is impossible. If the *Windsor Castle* was four miles north-west of Loophead, with a west wind and a lee-shore, four canoes—no! nor all the canoes on the Shannon, could have brought her round Loophead, but in spite of them she must have gone ashore and been wrecked."—Such is the opinion positively given by Captain Triphook, and he is echoed in this opinion by Charles McDonnell, a branch pilot, also produced on the part of the impugnants.

Now, nothing ever was proved in a court of justice more undeniable and incontestable than that this supposed impossibility is a fact which was actually accomplished; that the ship was found in the identical spot alleged, and

under the circumstances stated, and did nevertheless come round Loophead, under the towage and pilotage of the promovents.

It is true that a gentleman, who should be entitled to some degree of consideration on account of a knowledge of seamanship, has been produced by the impugnants—I mean Mr. William Randall, agent to Lloyds—and he says that, in his opinion, the ship would have come up the Shannon by drifting alone, without either pilotage or towage, and would in due time have made her appearance of herself, side-foremost, at the anchorage near Kilbaha, without touching any of the cliffs. In this opinion, however, Mr. William Randall is directly at issue with Captain Triphook and every other witness in the cause, and I pay no regard to this opinion, which appears to me to be at variance not only with the bulk of evidence in the cause, but with the plain dictates of experience and principles of physical science. Conceive the heavy unaided bulk of this great ship, drifting slowly in the tide, close under the enormous precipices of this headland, 250 feet in perpendicular height: does it stand to natural reason that her weight must not have borne her to the rocks? I rest, however, on safer grounds than any speculation or reasoning *à priori*; I have the decided testimony of reluctant nautical witnesses—Captain Triphook, Charles McDonnell, and Mr. Baldwin—who, without the slightest hesitation, concur in pronouncing the most unqualified opinion that, if left to herself, she must inevitably have gone ashore and become a total wreck.

Now, much argument has been expended on the facts connected with the construction, framework, weight, and materials of these canoes. One of the canoes was brought up from the Shannon, and placed at the doorway of the Court of Admiralty, that the Counsel and the Court might have the benefit of a view. It is contended that, on a comparison of the weight and fabric of the canoes, and the size and tonnage of the *Windsor Castle*, it is self-evident that two or three of such canoes, manned with ten or fourteen men, could not possibly move the *Windsor Castle* from a

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*The Shannon
canoes.*

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state of rest by towing, nor produce the slightest effect upon, or communicate the slightest motion to, the ship. The canoes are of a singular, compact, and neat texture, but so light, that an eight-oared canoe can be carried on a man's shoulders. Now, the question is, could ten or fourteen men, getting in those little boats, perceptibly affect the *Windsor Castle* by towage? All that was required was, that they should apply a force capable of countervailing the natural influence which tended to impel the vessel to the rocks; the rest would be performed by the current and the wind.

Now, I cannot say it strikes my mind that, either in theory or in the analysis of the evidence, there is any thing absurd in the supposition that these fishermen, sitting in the canoes and labouring as they did with the utmost and most strenuous exertions that human beings could apply, should be able to produce just that degree of effect, and no more, on the *Windsor Castle*, which was absolutely necessary to preserve her from following the laws of gravitation and dropping gradually to the rocks.

Subsequent
perils.

Another important question was debated in the Argument—and that is, supposing there was difficulty overcome, “Was there further danger encountered in clearing the headland?” On this point, Mr. Fitz-Gibbon, for the salvors, dwelt in powerful and pathetic language on the situation of the persons concerned, and drew a picture of the perils of that situation, remarkable, in my judgment, for a considerable degree of truth and probability, as well as for eloquence. According to Mr. Fitz-Gibbon, when those fishermen agreed together, as they say they did, to attempt the rounding of Loophead, they hazarded the lives of all, or at least of some, of them on the success of the undertaking; for he contends the ship went nearing the cliffs to a distance so small as that it was all but destruction, such as was never known before in that place. He says, the men's attention was wrapt up in the accomplishment of their object; that under Loophead there runs a dreadful surf, and that a long swell goes rolling in from the sea and dashes upon the bot-

In rounding
Loophead.

tom of the cliffs ; that the men would never give over till the moment in which it appeared certain the *Windsor Castle* was inevitably running on the shore, and he says *then* it would have been too late, amidst the breakers, to have provided for their own safety. I cannot help saying, this appears very probable to my mind, and, therefore, I am in nowise surprised when I find competent and uninterested witnesses, who surveyed the whole scene from the summit of the cliffs (themselves calm and aloof from the action), declare upon their oaths that there was visible and serious danger to the lives of all concerned : the salvors themselves, in the ardour of the action, might have been partly unconscious of the magnitude of the danger, but that it existed I cannot now reasonably doubt.

They now got the ship into the entrance of the river, but the salvage was not yet complete ; they had to anchor her in that exposed and dangerous place. The tide was running to ebb about three o'clock in the afternoon. When they got into the river, the country people came about the ship in their canoes, and danger under a new form was presented to the minds of the salvors, from the disposition to plunder which began to be displayed by the intruders. What increased the difficulty of the salvors was, that they were obliged necessarily to direct their whole attention to the care of the ship and the preparations for bringing her to anchor. During this period, the country people did begin pillaging, and some articles of no great value were stolen. At Horse Island, within the Shannon, the salvors, originally eighteen in number, were reinforced by seventeen other pilots or fishermen, who were received by the former into a fellowship of the salvage. All their efforts were absolutely necessary. At between Horse Island and the quay of Kilbaha, about a mile and a half from shore, the anchoring was effected at the turn of the tide. It was admittedly an operation attended with considerable difficulty. The anchor was 16 cwt. ; the chain cable was excessively heavy, and foul in the coiling ; one chain was unbent from the anchor, and below in the vessel's hold ; the sheckle-bolt of the

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From the
country people.

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second chain, which secures it to the anchor-ring, was started in the sheckle, and unfit for service. The pilots and fishermen removed the sheckle, and having passed the chain cable through the ring of the anchor, and taken a hitch or knot upon it, they made it secure to the anchor with another small chain. They next proceeded to remove the anchor with handspikes off the top-gallant forecastle, and with great exertion pinched it over the gunwale. They cleared and payed out seventy fathoms of chain cable; the depth of the river was forty-five fathoms in that place. The tide was very strong, and paying out the cable must have been terrible, without any of the mechanical helps usual on such occasions. The ship was brought to anchor at the very moment the tide began to ebb: the early part of the night proved tempestuous, the wind coming round to the south, which made the shore before her a lee-shore. Nothing but the utmost promptitude and expertness on the part of the salvors could have enabled them to overcome the many difficulties which they had to encounter in bringing the ship to anchor; and to that expertness and promptitude was the *Windsor Castle*, for the third time that day, indebted for her preservation.

When the ship was anchored, the pilots and fishermen next proceeded to drive out the intruding country people by force. They armed themselves with the handspikes, and, not before it was absolutely necessary, compelled the people to desist from plunder and quit the decks. This part of the service has been treated by the impugnants' Counsel as imaginary; but I cannot see any reason to treat the danger as slight, when I find Mr. Baldwin, of the coast-guard, who came aboard next morning with three of his men, at four o'clock, swearing most positively that he considered the salvors to be in extreme danger of their lives from the disposition of the country people. However, this, as well as all other difficulties, was overcome by the steadiness, patience, and sober good sense of this humble body of men, whose conduct in every respect serves as an example of merit under these trying circumstances.

One of the first steps taken by the salvors on anchoring

the ship was, to despatch a messenger to Mr. Burton, of Carrigaholt, the nearest justice of the peace, advising him of the transactions of the morning and of the actual position of the ship. Mr. Burton came aboard early in the morning of the 14th, and no doubt his presence, and that of Mr. Baldwin, contributed to prevent the danger of pillage.

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The next person who appears on the stage is Captain Triphook, of her Majesty's revenue cutter the *Hamilton*. This gentleman, hearing of the appearance of the derelict ship on the morning of the 13th, instantly started from the city of Limerick, where his cutter lay, and with much praiseworthy alacrity ran down the river on the night between the 13th and 14th, and discovered the *Windsor Castle* at her anchor about daybreak of the 14th. He boarded her at seven o'clock that morning. The conduct of the salvors was already the subject of general praise and approbation, and so complete was the acknowledgment of their signal merits—a rare circumstance where power deals with unprotected worth—no one thought of questioning their title as salvors, nor of interrupting their possession of the ship. Captain Triphook wished to join in the salvage, and proposed to use his cutter's services in towing the *Windsor Castle* up the river. The salvors resisted this proposition, but without rudeness or boisterousness; insisting on their rights as salvors, and firmly maintaining that they were capable of completing the work they had begun, and of bringing the derelict to a safe anchorage without the assistance of any other person whatsoever. The matter was calmly discussed, without any violence on either side. Captain Triphook expressly declared he did not mean to interfere with their rights, but that he thought his duty obliged and entitled him to join in the efforts for the preservation of the ship; that, however, he was ready to assure them his interference could not and should not in any way operate to their prejudice or in diminution of their just claims on foot of salvage. Mr. Burton, the magistrate, now interposed his authority and friendly advice, and at his instance the salvors consented to permit Mr. Triphook to join.

Services of
Capt. Triphook.

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The salvors had got a pilot's hooker from shore, and at the beginning of flood-tide, they weighed the anchor of the *Windsor Castle*, which was then taken in tow by the *Hamilton* and hooker.

I will not pursue in detail the transactions of the 14th: it would be unnecessary. The wind died away shortly after they left the place of anchorage; the derelict ship drifted towards the cliffs; the *Hamilton* and hooker dropped their tow-lines and shifted for themselves. The *Windsor Castle* was once more in the most imminent peril. She was got off chiefly by the opportune occurrence of a light breeze and the towing of the pilot's canoes. These latter worked then, in conjunction with the hooker and *Hamilton*, for the space of some miles. At length, about the entrance of Rienvella Bay, the wind again entirely subsided, and the hooker and *Hamilton* gave up all further attempts. Some miles up the Shannon, a steamer, which had been sent for, appeared in sight. A bargain was made with her to take the *Windsor Castle* in tow as far as Scatterry Roads for the sum of £20.

The ship
brought to safe
moorings.

She did so accordingly, somewhere between Beale Bar and Corless, and at four o'clock in the afternoon the pilots safely moored the *Windsor Castle* in Scatterry Roads. They had objected, as on former occasions, to the steamer's interference, being justly confident in their own certain means of working out the salvage service; but, with the same temper and moderation which they preserved from the very beginning to the end, they yielded their own opinions to the advice and authority of others.

With respect to Captain Triphook, I do not think that any part of his conduct on this occasion is in the least degree liable to exception; on the contrary, I think his spirit and activity, in getting out to the assistance of the derelict, are highly creditable to him, and that his temper throughout was quite proper and becoming; but I conceive the actual service he rendered was trivial in amount. As to Mr. Baldwin, I do not apprehend that he can be considered a salvor at all. The real and proper salvors, and the only ones whom I can recognize in this case, are the thirty-five pilots and fishermen who are the parties intervenient. They saved the

ship; they brought her to her moorings at Scatterry; they preserved her from plunder; and lastly, they guarded her for several weeks till her owners claimed her and received possession. For these services the salvors now apply to this Court to award a fair and just remuneration, and it is my duty to measure the amount of compensation to which they ought to be held entitled.

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The value of the *Windsor Castle* and her cargo, as agreed upon and admitted in an Act of Court, is £20,000. The owners have made a tender in the Acts to the pilots, and another to Captain Triphook and Mr. Baldwin, who had jointly brought their action as salvors against the vessel. The tender to the pilots was £1,000; that to Captain Triphook and Mr. Baldwin £350. Triphook and Baldwin accepted the tender, and discontinued their action: they thus became qualified as witnesses for the impugnants, and have been examined in the cause.

Value of the
property.

Tenders.

I feel under some difficulty in consequence of the tender and payment to Baldwin and Triphook. Were I to measure the reward due to the fishermen on the same scale of bounty and magnificence as that displayed by the owners in the payment to Triphook, equity would oblige me to value the pilots' services at the amount of one-half the net proceeds of the property. But I have been told, and I am disposed to give credit to the statement, that the tender was a hasty and improvident act of generosity, and is not to be drawn into the consideration of the Court in order to enhance the liability of the owners. I shall not do so, for the consequences would be, in my apprehension, that I should thereby make a decree substantially unjust, and inflame the losses of the owners beyond what the Court would be warranted by the evidence. But, this being the case, I must also in justice throw this payment of £350 entirely on the proportion of the property which will remain to the owners. To recognize it as a fair tender, and allow it in abatement of the sum going to the real salvors, would be an inconsistency in the award of the Court, unless I raised that award to a proportion which the owners might justly complain of as excessive.

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Merits of the
salvors.

Now, this is a case of absolute and completely legal derelict. It is a case, too, of the most perfect and incontestable salvage. That one fragment of the ship, or one bale of the goods, is now in existence, is due absolutely and entirely to the salvors. There neither was a human possibility that the ship would be saved without assistance, nor, except the assistance which in fact offered itself, was there any other possible means of escape under the circumstances. Long before Triphook could have arrived in his cutter, long before the aid of a steamer could have been summoned, the *Windsor Castle* would have been in pieces on the cliffs of Mall Bay, and her cotton floating on the waves. But even with the opportune assistance the pilots brought, it is further due to the extreme activity and promptitude they displayed that the short and lucky moment was not allowed to slip. They had but half an hour, and they turned it to account. The labour, the perseverance, the expertness of these men deserve high praise, and I have little doubt that, in the course of the morning, they more than once exposed their lives, and would have been willing to lose life, in the enterprise they undertook.

On the other hand, though I were to abate nothing from the substantial merits of the pilots, yet it is also to be observed that the difficulties in the case, though real and great, are not of that striking and affecting description which has often occurred in severe salvage services.

The property, also, is very large, and the condition in life of the pilots will enable me to allot them a just and adequate compensation at a less enormous expense to the owners than would perhaps be decreed in cases where the salvors were found in the wealthy and aristocratic classes of society.

On the whole, I decree to the salvors one-fourth of the agreed value of the ship and cargo, being £5,000, together with their costs and expenses.*

* The Editor is indebted to Dr. Monk Gibbon for this valuable Report.

High Court of Admiralty.

JULY 15, 1842.

THE "WILLIAM BRANDT JUNIOR."*—*Act on Petition.*—This was a claim on the part of the steam-vessel *Copeland*, the master of which had agreed to tow the *William Brandt junior*, with a cargo of timber, from the mouth of the river to London. It appeared that, about nine o'clock on the morning of the 14th November, 1841, the steam-tug, being abreast the Nore Light, with her steam up, waiting for any vessel that might require to be towed up, the wind blowing a gale from the N.W., saw and went to the *William Brandt junior*, and the master of the tug agreed to tow the vessel to London, when the weather moderated, for £16: she was in the mean time to sail up to Sea Reach. The ordinary charge for towing a vessel of that tonnage (204 tons) from Gravesend to London was £16. On arriving at Sea Reach, the wind increased, and the *William Brandt junior*, having lost her jib-stay and fore-top-sail yard, missed stays and got upon the sand or mud, called the Blyth Sand. She hailed the steamer, which endeavoured to get her off, but without effect that tide. Next tide, she succeeded in towing her off the mud and up to Deptford, where the vessel arrived at two o'clock on the afternoon of the 15th. The parties construed the agreement differently. The salvors alleged that it was to this effect: "that, as soon as the weather had sufficiently moderated, the steamer should take the ship in tow, and tow her up to London, for £16." The owners denied that this was the agreement, and alleged that no such conversation in respect to the weather took place, and that "it was understood that the ship should

An agreement for towage, when, from unavoidable circumstances, an accident occurs to the vessel towed, does not preclude the towing vessel from rendering services to be rewarded as salvage services.

* It was not deemed necessary to report this case in its proper place; but, as the observations of the Court on the conditions and circumstances which may convert a service originally of towage, under an agreement, into one of salvage, were adverted to in the case of the "*Betsey*" (p. 489), and were there repeated and re-adopted by the Court, the passage in the judgment bearing on that point is here inserted.

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*William Brandt
junior.*

JUDGMENT.

be immediately taken in tow." The value of the property was £6,250, and the action was entered for £650.

DR. LUSHINGTON.—The vessel (from no blame of the master of the tug) goes on the sand, and the point to which I must direct my attention is this: is the service afterwards performed under the agreement so generally worded to be included within the limits of the £16, or something beyond them? The agreement was for towing only. If in the performance of a salvage service—such towing being honestly, fairly, and skilfully performed—it happens, from inevitable circumstances, over which neither party has any control, that an accident occurs to the vessel taken in tow, and essential services are rendered by the vessel agreeing to tow her from one place to another, I am of opinion that the agreement does not cover such a service. I think I should be laying down a very dangerous doctrine if I were to hold that, where a person agrees to perform the simple duty of towing from the Nore to London, if from stress of weather, from an accident happening to the ship, or other circumstances of a like nature, it should so happen that other and different services have to be discharged, the original agreement is binding on the parties. The vessel remained on the sand till the tide flowed at night, and then she came off with great facility. I do not think it a service of a very eminent degree of merit, and I think the fact of the tug having been engaged in the service of the vessel tends to diminish the *quantum* of the reward for this extraordinary service. Am I to consider £16, the original amount agreed upon, as sufficient under these circumstances? I am of a contrary opinion. I think £16 might be a fair reward for a purely towage service; but I think that another service grew upon it, over which the master of the tug had no control, and that he is entitled to be paid for that also. I think the service was not of a high character, and I give £60.

I N D E X.

ACCOUNT (Inventory and)—see **PRACTICE**, VI.

ACKNOWLEDGMENT of signature, by testator, what amounts to. *Gaze v. Gaze*, 229. *Blake v. Knight*, 345.

_____, by witnesses to a will, not sanctioned by the statute. *Moore v. King*, 58.

ADMINISTRATION—see **PRACTICE**, I.

ADMIRALTY COURT, its jurisdiction over freight. "*Dowthorpe*," 264. "*Fortitude*," 515.

ALIMONY, deduction of income tax—see **PRACTICE** of, IV.

ALTERATION of Wills—see **REVIVAL**.

AMBIGUITY—see **EVIDENCE**.

APPORTIONMENT—see **SALVAGE**, 5.

ARTICLES :

1.—Against a parishioner for wilfully and contumaciously obstructing, or refusing to make, or join in making, a sufficient church-rate. *Steward v. Francis*, 131.

2.—Against a clergyman, for openly affirming and maintaining positions in derogation and depraving of the book of Common Prayer. *Sanders v. Head*, 355. Protest on ground of irregularity of proceeding under Church Discipline Act. *Id.* 364, 370. Offence punishable under Ecclesiastical law. *Id.* 382.

ATTESTATION of testamentary acts :

1.—Not invalidated by removal of one of witnesses' names and writing of it by another person not in testator's presence. *Re Tozer*, 11. Nor where, both witnesses being markswomen, testatrix inadvertently inserted a wrong name. *Re Ashmore*, 465.

2.—Insufficient: Where one witness attests one day and another on another day, in presence of testator, the last witness in presence of first, who acknowledged her signature. *Moore v. King*, 45. Where one of two witnesses signed as writer of the will, not as an attesting witness, and prior to signing by deceased. *Hooley v. Jones*, 59. Where two witnesses, a man and wife, called to attest a will, and man subscribes his own name and his wife's. *Re White*, 461.

3.—Where two attesting witnesses depose that the signature of testator was affixed after attestation, when not supported by the circumstances, the Court will distrust their recollection. *Cooper v. Bockett*, 391. *Pennant v. Kingscote*, 405a.

4. Attestation must follow signing of will by testator. *Cooper v. Bockett*, 397. *Wilmott v. Gilham*, 397a.

_____ see **LEGATEE**.

BOTTOMRY :—A bond given in Holland cannot include advances made in England, for which a promissory note was given payable in Holland. "*Lochiel*," 177. Where a bond is granted on ship and cargo, the freight is liable proportionably. "*Dowthorpe*," 264.

BOUNTY on destruction of pirates due only when effected by Queen's officers and men. *Piratical vessel*, 9.

_____ on capture of slave-vessels, principles of just capture. "*Societade Feliz*," 430.

CAPACITY:—Distinction between eccentricity and unsoundness of mind. *Mudway v. Croft*, 438. Rule for discriminating one from the other. *Id.* 442. Where there is conflicting testimony by attesting witnesses. *Hatchwell v. Hatchwell*, 513.

CANCELLATION—see **REVOCATION**.

CARGO of a ship lost, sued for wages—see **WAGES**, 2.

CHURCH DISCIPLINE ACT, form of proceeding under. *Sanders v. Head*, 360, 368.

CHURCH RATE:

- 1.—Made by churchwardens, with the minority, in vestry, held valid on appeal, reversing judgment in court below. *Veley v. Gosling*, 278. Obligation on parishioners to repair the church. *Id.* 289. Effect of obligation. *Id.* 290. Manner of enforcing it. *Id.* 291, 295. Church-rate not a tax. *Id.* 298. Analogies. *Id.* 307.
- 2.—Due from a deceased rate-payer, not recoverable against his executor. *Williams v. George*, 85. Church-rate a personal obligation. *Id.* 90.
- 3.—A rate for pulling down and rebuilding a church void for want of consents. *Williams v. George*, 85. Under a local Act, sustained, on appeal. *Nunn v. Varty*, 106.
- 4.—Law of church-rate. *Nunn v. Varty*, 109. *Steward v. Francis*, 143. *Veley v. Gosling*, 289.
- 5.—Articles against a parishioner for obstructing or refusing to join in making a rate. *Steward v. Francis*, 131.

CITATION—see **PRACTICE**, II.

CODICIL:—Effect of term, in a will confirming "Codicils," where some were unattested. *Ferraris v. Hertford*, 260.

COHABITATION of wife with husband after last act of cruelty; effect of on suit for separation. *Snow v. Snow*, i. Supp.

COLLISION:

- 1.—Construction and application of Trinity House rules. "Gazelle," 39. "Friends," 92. "Rose," 101. "Columbine," 144. "Traveller," 476. "London Packet," 501.
- 2.—Where two vessels are approaching each other, and there is the slightest danger of collision, proper steps must be taken to avoid it, by giving way when not required by rules. "Traveller," 479. A vessel doing damage cannot plead "inevitable accident," if in a dark or hazy night she carries much sail, and goes at great speed, neglecting measures of precaution. "Virgil," 499. What is the law of inevitable accident. *Id.* 500.
- 3.—Exoneration of owner of vessel causing damage, by having a pilot on board under Liverpool Pilot Act. "Agricola," 113. By having a pilot on board under general Act, though not under compulsory clauses. "Fama," 418.

CONDONATION, in bar to suit for divorce, meaning and effect of. *Snow v. Snow*, xi. Supp. Distinction between cases of adultery and cruelty. *Id.* xiv. Supp.

CONSTRUCTION OF STATUTES—see **STATUTES**.

CREDITOR—see **PRACTICE**, III., and **SEQUESTRATION**.

CRUELTY, suit for divorce by reason of, by wife, not barred universally by cohabitation after last act. *Snow v. Snow*, xvii. Supp. What is necessary to revive condoned cruelty. *Evans v. Evans*, 470.

CUSTOM, on river Thames, superseded by Trinity Rules. "Gazelle," 39.

DAMAGE—see **COLLISION**.

DESERPTION—see **WAGES**, I.

DIOCESAN COURT, irregularities of proceedings in. *Williams v. George*, 85.

DIVORCE—see **CRUELTY**.

DOMICIL :

- 1.—A will by a person of English parentage, domiciled in Turkey, *p. f.* subject to Turkish law. *Maltass v. Maltass*, 33. A will made in England in Scotch form, by an officer in service of East-India Company on furlough, where domicile of origin was Scotland, admitted to probate in Scotch Court, invalid. *Craigie v. Lewin*, 185. A codicil made by a British subject, resident at Milan, disposing of personal property in America, valid by law of Milan, invalid. *Ferraris v. Hertford*, 230.
- 2.—What constitutes change of domicile. *Craigie v. Lewin*, 194.

ECCENTRICITY, rule for distinguishing it from unsoundness. *Mudway v. Croft*, 442.

EVIDENCE, oral, admitted to explain ambiguity on face of instrument. *Uppill v. Marshall*, 400—see **PRACTICE**, V.

EXECUTION :

- Defective* : after attestation. *Hooley v. Jones*, 59. At foot of first page. *Re Davis*, 350. In margin, on a printed form. *Re Martin*, 385.
- Irregular* : on reverse side of paper on which the will was written, after a blank. *Re Bullock*, 352. On second side of sheet, deposition being written on first and third sides. *Re Gardiner*, 459. On first side of sheet, the second being blank, and signatures on third. *Re Gore*, 479.

EXECUTOR according to tenour, who. *Re Wedge*, 14.

FREIGHT, liable to a bottomry bond rateably with the ship. “*Dowthorpe*,” 264. *Semble*, where ship and cargo only are hypothecated on bottomry, the freight must be exhausted before recourse can be had to cargo. *Id.* 273. But Court of Admiralty will not exercise its jurisdiction at the instance of a mortgagee, to adjudicate questions as to ownership of freight, which was not in the hands of the Court. “*Fortitude*,” 515.

INCOME TAX, deducted from alimony—see **PRACTICE**, IV.

INCORPORATION OF PAPERS *dehors* will : cases of : *Birkhead v. Bowdoin*, 66. *Morrice v. Morrice*, 199. *Re Sinclair*, 222. *Ferraris v. Hertford*, 230. *Jorden v. Jorden*, 388.

INVENTORY and **ACCOUNT**—see **PRACTICE**, VI.

JOINT CAPTURE of slave vessels, principles applicable to. “*Sociedade Felix*,” 430.

JUDICIAL COMMITTEE of Privy Council not authorized to make orders *proprio vigore*. *Taylor v. Taylor*, 176.

JURISDICTION, questions relating to, 131, 504.

LEGATEE, universal, in trust (without beneficial interest), attesting the will, does not render bequest void. *Re Ryder*, 462.

LIGHTS, carrying of, by merchant vessels. “*Rose*,” 104. “*Columbine*,” 148.

MILITARY SERVICE. What is “actual military service,” within the meaning of 1 Vict. c. 26, s. 11. *Drummond v. Parish*, 325.

MORTGAGES of ships, though they cannot initiate a suit in the Court of Admiralty, may appear to protect their interests. “*Dowthorpe*,” 272. But the Court will not exercise jurisdiction at the instance of a mortgagee, to adjudicate questions of ownership of freight, where the vessel only is arrested, and the freight is not in the hands of the Court. “*Fortitude*,”

515. A mortgagee is not entitled to arrest the ship to prevent its being taken out of the country by part owner. "*Highlander*," 316.

NULLITY OF MARRIAGE :

- 1.—Imposition as to name and condition (there being no *error de persona*) does not nullify a marriage by license. *Clowes v. Clowes*, 1.
- 2.—*Impotentia causâ*, where plea of malformation failed, and no *triennalis cohabitatio*, suit by woman against man not sustained. *Scott v. Jones*, 36. Where rule of *t. c.* applies. *Id.* 37.

PILOT ACTS—see COLLISION and STATUTES.

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POWERS, execution of. *Re Boswell*, 154.

PRACTICE :

- I. *Administration* : 1. With will of effects in England granted to attorney of a permanent assignee of an insolvent estate of a testator dying in Van Diemen's Land, appointed by the court of that island, after executor had taken probate. *Re Murray*, 23.
- 2.—With will (limited) granted to nominees of charitable institutions. *Blind School v. Flack*, 106.
- 3.—With will of a paper referring to a will not forthcoming, allowed to be taken, not decreed. *Re Clifford*, 125.
- 4.—Where chain of representation broken, administration *de bonis non* granted to an administrator of a party entitled to effects of original deceased by deed. *Re Edhouse*, 126.
- 5.—A party in possession of letters of administration, not allowed to be put on proof of title thereto, in order to raise a question of legitimacy determined by a diocesan court. *Meddowcroft v. Huguenin*, 156. Whether former sentence could be so impeached, *quære*. *Id.* 170.
- 6.—An administrator of a void grant, applying to have letters revoked, must give security before sureties are discharged. *Re Bergman*, 22.
- 7.—Granted on presumed death of party. *Re Farrington*, 468.

II.—Citation :

- 1.—In a suit by articles for wilfully obstructing or refusing to make a church-rate, citation need not set forth more than general nature of charge. *Steward v. Francis*, 137.
- 2.—In a suit by wife for divorce for adultery, and citation taken out by proctor before proxy signed by his party, and served on husband, resident within jurisdiction, abroad, protest to jurisdiction on those grounds over-ruled. *Collett v. Collett*, 504.

— see PRACTICE, VIII., 2.

III.—*Creditor* : Not allowed to call in and contest Letters of Administration granted to an alleged next of kin, though *prima facie* fraudulently obtained. *Re Newsom*, 15.

IV.—Deductions :

- 1.—In payment of alimony, income-tax may be deducted. *Pemberton v. Pemberton*, 17.
- 2.—In ascertaining amount of fund for payment of salvage, wages subsequent to service proper deduction. "*Selina*," 18. As to wages earned before the service, *quære*. *Id.*

V.—Evidence :

- 1.—A witness, incompetent by reason of interest, allowed, after publication, to be released and re-examined. *Clark v. Carter*, 176.
- 2.—Releasing witnesses. "*Sociedade Feliz*," 432.

- 3.—To prove partial desertion by a mariner under Stat., the log must be verified by a witness. "*Two Sisters*," 429.
- VI.—*Inventory and Account* :
- 1.—A nude executor, claiming to take residue, bound to exhibit I. and A., or to admit assets. *Burgess v. Marriott*, 171. Whether he is bound *ex officio* to do so, *quære*. *Id.* 173. In such questions, the Court of Probate must consider the construction of the will. *Id.*
 - 2.—An executor bound to exhibit I. and A. at suit of creditor, or admit assets, notwithstanding lapse of time. *Jickling v. Bircham*, 463.
- VII.—*Jurisdiction* : Judicial Committee of the Privy Council cannot, *proprio vigore*, make an order for payment of alimony till the party complied with a decree. *Taylor v. Taylor*, 174. The Statute gives the power to "the Queen in Council." *Id.* 176.
- VIII.—*Plea* :
- 1.—In a suit for restitution, by husband, met by a charge of cruelty which had been ground of a suit in another Court, but abandoned, husband not allowed to be heard against admission of wife's Allegation pleading such charge. *Dysart v. Dysart*, 16. *Semble*, that the wife may plead the same facts as were pleaded in abandoned suit. *Id.* 17.
 - 2.—In a suit of nullity, by husband, his Allegation being rejected, the wife allowed to bring in a plea for restitution without citing the husband. *Clowes v. Clowes*, 77.
 - 3.—In a suit for divorce for cruelty, by wife, whether condonation in bar should be noticed before pleaded. *Snow v. Snow*, xi. Supp.
 - 4.—In a suit for divorce for adultery, appealed, Libel of Appeal and Inhibition must agree. *Frankfort v. Frankfort*, 494.
- IX.—*Proctors*, appearing in Court of Admiralty for salvors, and unable to set forth their names, personally liable for costs in which they may be condemned. "*Wilhelmine*," 213. Practice as to appearance in that Court without exhibiting a proxy. *Id.* 216. Duty of Proctors without proxy. *Id.* Party authorizing a Proctor to appear, though without proxy, liable to attachment for disobedience. *Id.* 219.
- X.—*Rejoinder*, in an Act on Petition, may be objected to on the ground that it contains matter already pleaded. "*Ann and Jane*," 313.
- REPUBLICATION of a will, attested by a codicil, on evidence of intention, held not to revoke the codicil. *Uppill v. Marshall*, 401.
- RESTITUTION of conjugal rights, suits for. *Dysart v. Dysart*, 16. *Clowes v. Clowes*, 77. *Taylor v. Taylor*, 174.
- REVIVAL of a will, revoked, only by re-execution or republication. *Major v. Williams*, 196. Therefore, the destruction of a will revoking a former will still in existence does not, *per se*, revive such revoked will. *Id.* A will and codicil revoked by marriage revived by a codicil after marriage ratifying testator's "will." *Neale v. Pickard*, 406. Alterations made in a will so revived thereby republished, the will being revived in its then state. *Id.* 408.
- REVOCATION of a will not effected by removal of name of one subscribing witness, with the knowledge of the deceased. *Re Tozer*, 11. Nor by tearing off signatures, without intention of revoking entirely. *Birkhead v. Bowdoin*, 71. Nor by such tearing being done by an executrix by direction of testator when incompetent. *Re Cooke*, 73.
2. Where a will of 1837, altered by a codicil of 1837, was republished in 1838, as "this writing," held, on parol evidence (admitted by

reason of ambiguity) of absence of intention to revoke, that the republication of the will did not revoke the codicil. *Upfill v. Marshall*, 400.

SALVAGE:

- 1.—The aiding in rescue of crew of a vessel from slavery, and in attack of pirates who had cut them off, founds no claim for salvage. "*Mary*," 27. Civil salvage rests upon services to a ship or cargo in actual danger or distress. *Id.*
- 2.—When towage, under an agreement, becomes a salvage service. "*Betsey*," 409. "*William Brandt, junior*," lvii. Supp.
- 3.—Accomplished by fishermen on the coast of Ireland, under peculiar circumstances of intrepidity, skill, and risk. "*Windsor Castle*," liii. Supp.
- 4.—Agreements for salvage, not inequitable, will be enforced by Court of Admiralty. "*True Blue*," 413.
- 5.—Apportionment between owners and crews of steam-tugs. "*Beulah*," 61. Of fishing-smacks. "*Louisa*," 149.
- 6.—What are proper deductions from the fund. "*Selina*," 18.

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- 6 Geo. 4, c. 49—10.
- 6 Geo. 4, c. 125—121.
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- 5 & 6 Will. 4, c. 19—422.
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_____ MASTERS, assisting the Court of Admiralty, not influenced by affidavits in matters of nautical science. "*Gazelle*," 41.

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- 1.—What absolute and partial desertion, incurring forfeiture of, under Stat. "*Two Sisters*," 420. Evidence requisite to prove the latter. *Id.* 429.
- 2.—Where mariner is lost, with ship, part of hull and cargo being saved, his widow may sue owners for his wages. "*Reliance*," 347. Whe-

ther, where ship is lost and part of cargo saved, a mariner can sue that part for wages, *quare*. "*Riby Grove*," 207.

- 3.—Where a mariner had contracted to serve on board a whaler, on condition of receiving an allowance on proportion of oil, &c. taken, in addition to wages, the contract a special one, not within jurisdiction of Court of Admiralty. "*Riby Grove*," 205.

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- 1.—Paper of 1832, unsigned, disposition approved in 1842, refused probate. *Re Shepherd*, 12. A paper of 1823, executed by a mark, surviving attesting witness deposing against it, admitted to probate on other evidence. *Re Fassnidge*, 316. A codicil without date, attached to will of 1837, refused probate. *Re Morrell*, 354. Part of a letter, duly executed and attested, admitted to probate. *Re Wedge*, 14.
- 2.—A will destroyed, after death of testator, who had consented to destruction, copy admitted to probate. *Re Carter*, 105. A will lost, probate (limited) of copy refused. *Re Denston*, 128.
- 3.—Will of an aged testator, drawn by party principally benefited, under circumstances of suspicion (pronounced against in Court below), on appeal, pronounced for. *Chambers v. Wood*, 481. Testamentary history of a deceased, unless examined with discretion, may lead to error. *Id.* 486. A will and codicils, bearing genuine signature of testator, but accompanied with very suspicious circumstances, though capacity of testator unimpeached (pronounced for in Court below), on appeal, pronounced against, further evidence being admitted. *Panton v. Williams*, xxi. Supp. Burthen of proof. *Id.* xxix. Rules of Court Christian as to evidence. *Id.* xlii.
- 4.—Will of a person deprived by paralysis of use of speech and almost of limbs, admitted to probate. *Re Field*, 384. Will of a person in a state of incapacity, formally drawn and regularly executed and attested, refused probate. *Williams v. Williams*, 390.
- 5.—Wills of soldiers: A major-general in the army, on full pay, director-general of artillery, resident at Woolwich, not "a soldier in actual military service." *Drummond v. Parish*, 318. What is "actual military service." *Id.* 325. Origin and history of the exception in Stat. *Id.* 326.

— See DOMICIL, REVIVAL, and REVOCATION.

END OF VOL. II.

ERRATA.

Vol. I. p. 566. In the "*Athol*." The action was not against her Majesty's ship, but (with consent of the Lords of the Admiralty) against the commander.

Vol. II. p. 486, line 4 from bottom, for "after," read "up to."

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